89-101

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLEMAN A. YOUNG,
Petitioner,

v.

THE COUNTY OF OAKLAND and
THE COUNTY OF MACOMB,
Respondents.

PETITION OF COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Do suburban counties which contract with the City of Detroit for sewerage services have standing to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15, for alleged overcharges for those services where the counties have passed on 100 percent of any overcharge to municipalities and end users as mandated by state statute?

II.

Where state statute requires 100 percent of any alleged overcharge to be passed on by the direct purchaser, is the pass-on a defense to suit by the direct purchaser under Section 4 of the Clayton Act?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, other parties to the proceeding in the Sixth Circuit are the City of Detroit; Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr.; Wayne Disposal, Inc.; Sam Cusenza; Joseph Valentini; Wolverine Disposal, Inc.; Wolverine Disposal-Detroit, Inc.; Charles Carson; Michigan Disposal, Inc.; Walter Tomyn, and Charles Beckham, all of whom were defendants in the district court and appellees in the Sixth Circuit. All of the above parties, with the exception of Charles Beckham, have filed petitions for certiorari with this Court.

Other parties to the proceeding in the district court are Darralyn Bowers and Vista Disposal, Inc.; these defendants did not appear in the Sixth Circuit.

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Petitioner, Coleman A. Young, Mayor of the City of Detroit, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 27, 1989, which reversed the district court's dismissal of respondents' complaint. Certiorari is requested in order to resolve the conflict between the Sixth and Seventh Circuit Courts of Appeal on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 866 F.2d 839, and is reprinted at A-1. By order dated April 19, 1989, the Sixth Circuit denied defendants' petitions for rehearing and suggestions

for rehearing *en banc*. This order is reported at 866 F.2d 839 and reprinted at A-25.

The opinion of the district court dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is reported at 620 F. Supp. 1399 and reprinted at A-29. The order of the district court dismissing the complaint in accord with this opinion is unreported, and reprinted at A-38. The opinion of the district court denying respondents' motion to alter judgment, A-40, is reported at 628 F. Supp. 610. The order of the district court denying respondents' motion to alter judgment, A-49, is unreported.

JURISDICTION

The opinion of the Sixth Circuit was issued January 27, 1989. The Sixth Circuit denied Petitioner's timely-filed petition for rehearing and suggestion for rehearing *en banc* on April 19, 1989. Pursuant to 28 U.S.C. § 2101(c), this petition for certiorari has been filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a)(1982), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

A. *Background.*

This Petition involves claims by Oakland County and Macomb County, Michigan,[1] against Petitioner, the Mayor of the City of

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[1]Oakland and Macomb Counties are collectively referred to as "the counties." Oakland County initially filed suit, and Macomb County later intervened as a plaintiff and filed a duplicate complaint.

Detroit, in his official capacity; the City of Detroit; a city employee; and various sludge disposal companies and persons associated with them.

The City of Detroit has provided sewerage services to suburban communities for many decades. Oakland and Macomb Counties, along with other suburban counties, operate sewage disposal districts on behalf of various municipalities. The counties contract with Detroit for sewerage services. The sewerage services Detroit provides include transportation, treatment and disposal of sewage. Sludge is an end product of the sewage treatment process, which must be hauled to a landfill for disposal. Detroit purchases sludge hauling and disposal services from private contractors. Detroit bills the counties for sewerage services, and makes no separate charge for sludge hauling or disposal. The counties pay Detroit with segregated monies collected from the municipalities. (Complaints ¶¶ 19, 20.)

In 1977, the United States sued the City of Detroit in the Eastern District of Michigan, alleging that Detroit's disposal of sewage was in violation of federal environmental laws and regulations. By a consent decree entered in March 1979, the district court made Petitioner the administrator of the wastewater treatment plant operated by the Detroit Water and Sewerage Department. The order granted Petitioner the power of a receiver.[2]

The counties' antitrust claims arise out of Petitioner's award of a contract for sludge disposal, and the administration of sludge disposal contracts, under the terms of the consent order. (Complaints ¶ 41, 44.) The counties allege that Petitioner and the other defendants conspired to fix prices and monopolize the market for the

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[2]Because it required Detroit to dispose of increased quantities of sludge, the order included the power to award sludge disposal contracts "without the necessity of any actions on the part of the [Detroit] Common Council" and "without competitive bidding." *United States* v. *City of Detroit*, 476 F. Supp. 512, 515, 516 (E.D. Mich. 1979). Petitioner was specifically exempted from any duty to, among others, "suburban governments" such as Oakland and Macomb Counties, in the award of such contracts and administration of the wastewater treatment plant. 476 F. Supp. at 521.

sale of sludge disposal services to the City of Detroit, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. As a result, they allege, Detroit procured sludge disposal services at inflated prices and increased its charges for sewerage services to cover these inflated costs. (Complaints ¶¶ 48, 49.)[3]

The counties filed suit as private plaintiffs under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a)(1982), claiming as damages the alleged overcharges they paid with municipality monies. (Complaints ¶ 49.)[4] They are subject to any defense, including lack of standing, available against any other private plaintiff.

B. *The Pass-On.*

For the purposes of the opinion below, the Sixth Circuit "assume[d] . . . that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. Indeed, it is uncontroverted that any overcharges were passed on. The counties allege that they "collect[] revenues from municipalities within each district and pay[] Detroit." (Complaints ¶ 20.) By affidavit, the counties admit that the payments they collect from the municipalities are deposited in segregated funds (the "Sewerage Funds" or the "Funds") specifically established and used to pay Detroit for sewerage services, that these Funds are the sole sources of monies used to pay Detroit for sewerage services, and that county monies are not used for this purpose.[5] Nor, as the Court of Appeals recognized in a prior case arising out of the same

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[3]The counties also assert a pendent state law claim of breach of fiduciary duty against Petitioner, and a RICO claim against the other defendants (but not Petitioner). (Complaints ¶¶ 54-92.) Like their antitrust claims, the counties' breach of fiduciary duty claims against Petitioner rest on allegations that Detroit procured sludge disposal at inflated prices and thereby increased its charges for sewerage services. (*Id.* ¶¶ 87-92.)

[4]Section 4c of the Clayton Act, 15 U.S.C. § 15c, allows only state attorneys general to sue *in parens patriae*.

[5]By affidavit, Oakland County's chief deputy drain commissioner stated:

> Regardless of the method of calculation, the County's collection of and administration of money from the municipalities follows procedures established by the Municipal Finance Officers Association as prescribed by the Michigan State Treasurer (See Mich. Comp. L. Ann. 141.421),

contracts and transactions, will the counties be obligated to use their own funds to pay Detroit in the event there is a shortfall in the Sewerage Funds:

> Since Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities in the Southeastern System to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment.

County of Oakland v. *City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984). *Also see* A-9-10, 866 F.2d at 845.[6]

> which require the use of an enterprise fund method. Oakland, therefore, collects the sewage treatment charges which have been billed to the municipalities and deposits such receipts with the County Treasurer in the County's name. Importantly, the County maintains separate, segregated accounts ("Funds") which reflect the receipts collected for each sewer district. Oakland administers those Funds and pays Detroit's sewage treatment bills from those Funds. Oakland pays Detroit out of those funds without regard to whether the municipalities pay in full or on time. Any recovery by Oakland in this litigation will be credited to the Funds.
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> * * *
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> In summary, the County Treasurer obtains the necessary funds to pay Detroit from bills sent by the Districts to the municipalities, and the municipalities in turn obtain their funds by bills sent to the end users. The users pay the municipalities, which maintain segregated sewer accounts, and from those accounts the municipalities pay the County Treasurer, who maintains segregated Funds for each of the Districts. As such, the municipalities "pass through" sewage treatment costs directly to the users.

(R. 351: Affidavit in Support of Motion to Alter Judgment ¶¶ 16(b), 24.) The affidavit mirrors the allegation in both counties' complaints that the counties pass-on all sewerage charges to the municipalities. (Complaints ¶ 20.) Macomb County did not file an affidavit, but relied on the papers filed by Oakland County.

[6] While the Sixth Circuit suggests that the counties might not "be relieved of the responsibility for paying Detroit to the extent the counties might be unable to collect from the municipalities," A-9 n. 5, 866 F.2d at 845 n. 5, the counties do not allege that their damages stem from any failure of the municipalities to pay for sewerage services. Nor is there any allegation that the counties suffered any loss through reduced volume. Because the counties are prohibited by statute from making a profit or loss on the Sewerage Funds, A-21 n. 6, 866 F.2d at 850 n. 6, Mich. Comp. Laws, § 123.745, it is impossible for them to suffer any such damage. Finally, in assuming all damages had been passed on, the Sixth Circuit opinion concedes the absence of any issue of fact.

The process of contracting and paying for sewerage services is in accord with the comprehensive legislative scheme laid out in Michigan Public Act No. 185, Mich. Comp. Laws §§ 123.731 *et seq.* (1967 & Supp. 1988). Section 15 of the Act, Mich. Comp. Laws § 123.745, authorizes municipalities to contract with the counties for sewerage services and the counties in turn to contract with Detroit. It specifically mandates that all costs incurred by the counties will be passed on to the municipalities.[7]

C. *Proceedings Below.*

The defendants, in motions to dismiss the complaints pursuant to Rule 12(b)(6), argued to the district court that the counties lacked standing to sue under Section 4 of the Clayton Act because they had passed on all of their alleged damages to the municipalities, who may in turn have passed any damages on to the end users. The district court granted the motions to dismiss, concluding that because the counties had passed on 100 percent of any damages, the indirect purchasers, not the counties, are the only possible plaintiffs under this Court's reasoning in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). A-29, 620 F. Supp. 1399. The district court subsequently denied the counties' motions to alter judgment on the same ground. A-40, 628 F. Supp. 610.[8]

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[7]Section 15 provides in pertinent part:

> Any charges specified in any such contract [between a municipality and a county] shall be subject to increase by such county at any time, if necessary, in order to provide funds to meet the obligations of the [sewerage] project.

[8]The district court also concluded for essentially the same reasons that the counties lack standing to sue under Article III, Section 2 of the Constitution. Respondents' breach of fiduciary duty claims against Petitioner were dismissed on this ground, and Article III also formed an alternative basis for the dismissal of respondents' antitrust claims. The Sixth Circuit reversed. Defendant City of Detroit and defendants Nancy Allevato, as personal representative of the estate of Michael Ferrantino, Sr., *et al.*, have filed petitions for a writ of certiorari seeking review of the Sixth Circuit's decision on Article III standing. Petitioner joins in the question presented and relief requested by those petitions with respect to Article III, and notes that if granted, it is also dispositive of respondents' breach of fiduciary duty claims.

On appeal, the Sixth Circuit reversed the district court. The Sixth Circuit acknowledged this Court's statement in *Illinois Brick* and *Hanover Shoe* that a pass-on defense might be appropriate " 'when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged,' " A-18, 866 F.2d at 849, *quoting Hanover Shoe*, 392 U.S. at 494, and *citing Illinois Brick*, 431 U.S. at 724 n.2. It further conceded that "100 percent of the charges imposed by Detroit on the count[ies] were passed on by the count[ies] to the municipalities, which would make the count[ies] a 'conduit' in an economic sense." A-10, 866 F.2d at 845.[9] Nevertheless, the Sixth Circuit concluded that " 'evidentiary complexities and uncertainties' " involved in ascertaining the damages of the municipalities and end-users make it inappropriate to permit the defendants to assert the pass-on as a defense. A-17, 866 F.2d at 848, *quoting Illinois Brick*, 431 U.S. at 732.

In its order denying defendants' petitions for rehearing and suggestions for rehearing *en banc*, the Sixth Circuit expressly acknowledged that its refusal to recognize a pass-on defense, in spite of the conceded total pass-on to the municipalities, was in conflict with the reasoning of the *en banc* Seventh Circuit in *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 109 S. Ct. 543 (1988) (Posner, J). The Sixth Circuit stated:

> [T]he *Illinois Brick* Court's observation that a "cost-plus" contract exception "might be permitted" was limited to contracts for a fixed quantity. 432 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.

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[9]For the purposes of this petition, Petitioner assumes, as did the Sixth Circuit, that the counties were "direct purchasers." Petitioner notes, however, that the counties are at best direct purchasers only of sewerage services. They are indirect purchasers of sludge disposal services, the market in which the alleged antitrust violation occurred.

> 1988) (*en banc*), *cert. denied,* __ U.S. __, 102 L. Ed. 2d 573 (1988), we do not think the purpose of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

A-27, 866 F.2d at 852.[10]

This petition is filed to seek a resolution of the conflict among the circuits on the important issue of whether and under what circumstances a federal antitrust defendant may defend on the ground that 100 percent of the plaintiff's alleged damages have been passed on to others farther down the distribution chain.

REASONS FOR GRANTING THE PETITION

The issue presented by this petition involves a pure question of law on undisputed facts, and an acknowledged conflict among the circuits. In *Panhandle Eastern,* an *en banc* opinion authored by a noted antitrust scholar, the Seventh Circuit held that where a utility paid a supplier's illegal overcharges but passed 100 percent of those charges on to the utility's residential gas customers pursuant to state regulation, those customers (and the state attorney general as *parens patriae*) were the *only* parties with standing to sue for the injury passed-on. In the present case, the Sixth Circuit held—completely to the contrary—that the counties have standing to sue notwithstanding the conceded fact that they have passed on 100 percent of the alleged overcharges to their customers in accord with a state statutory scheme. The Tenth Circuit, in *In re Wyoming Tight Sands Antitrust Cases,* 866 F.2d 1286 (10th Cir. 1989), *petition for cert. filed sub nom. Kansas* v. *The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989) (No. 88-2109), has also explicitly rejected the view of the *en banc* Seventh Circuit. The Fifth Circuit, however, earlier reached a conclusion consistent with the Seventh Circuit in *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980).

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[10]In an apparent typographical error by the publisher, the final portion of the quoted passage is omitted from the published version of this order.

This conflict among the circuits has come about because, while this Court in *Hanover Shoe, Illinois Brick* and most recently in *California* v. *ARC America Corp.*, __ U.S. __, 109 S. Ct. 1661 (1989), stated that a 100 percent pass-on "might" be used either offensively or defensively in cases brought under Section 4 of the Clayton Act, it has not resolved this issue or established the parameters of the pass-on theory. The conflicting decisions of the courts of appeal are sowing confusion among litigants and the lower courts, and are frustrating the uniform administration of the antitrust laws. This case squarely presents an issue which should be resolved by this Court.

I.

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE *EN BANC* DECISION OF THE SEVENTH CIRCUIT IN *PANHANDLE EASTERN*.

Like the *en banc* Seventh Circuit in *Panhandle Eastern*, the Sixth Circuit conceded that pursuant to state regulation, 100 percent of any damages were passed on to the purchasers of a utility service. Yet despite the conceded 100 percent pass-on, the defendants were denied a pass-on defense. Although the Sixth Circuit alludes to problems of apportionment of damages among purchasers at different levels of the distribution chain, it fails to acknowledge that no such problems exist in the present case, where the pass-on—at least to the municipalities—is *conceded to be total.*[11]

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[11] In the present case, it need not be resolved who among the municipalities and the end users is a proper plaintiff. Notably, however, municipalities and end-users have filed suits, virtually identical to the counties' complaints, which have been stayed pending the outcome of the appeal process. *Charter Township of Canton, et al.* v. *City of Detroit, et al.*, No. 86-CV-70642-DT (E.D. Mich.); *County of Oakland, Alice Shoenholtz, David Snyder and all other persons similarly situated who are end users of the Detroit Water and Sewerage Department* v. *Charles Beckham, et al.*, No. 86-CV-74656-DT (E.D. Mich.). These lawsuits base standing on the pass-on of charges to municipalities and end users.

The conflict between the Sixth and Seventh Circuits is complete. In *Panhandle Eastern*, Central Illinois Light Company ("CILCO") purchased natural gas from Panhandle "at prices allegedly inflated because of violations of the antitrust laws by Panhandle." 852 F.2d at 892. CILCO resold the gas to its residential customers, passing on the entire overcharge in accord with state utility regulation. The Illinois Attorney General sued *in parens patriae* to recover the overcharges for CILCO's customers.

A panel of the Seventh Circuit held that the residential customers, and the state on their behalf, were indirect purchasers who lacked standing to sue. Although the contracts between CILCO and those customers were "cost-plus," they did not require customers to purchase a "fixed quantity" of natural gas. The panel believed that a "fixed quantity" requirement was necessary to avoid problems of damage apportionment between the direct purchaser and its customers. 839 F.2d 1206, 1209-10 (7th Cir. 1988). It relied on this Court's statement in *Illinois Brick*, 431 U.S. at 736, that "[i]n such a [cost-plus contract] situation the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." 839 F.2d at 1210.

On rehearing *en banc*, the Seventh Circuit rejected the reasoning of the panel and held that the attorney general had standing to sue on behalf of CILCO's residential customers. The court concluded that although the quantity of natural gas purchased by residential customers was not fixed by contract, they had no alternative source for this utility service. Because of this fact, and because there was "a contract that required 100 percent passing on, and an acknowledgement of 100 percent passing on in every kilowatt hour resold to CILCO's residential consumers," 852 F.2d at 894, there was no problem of apportioning injury between CILCO and its residential customers. Those customers, and not CILCO, suffered all of the injury and had exclusive standing to sue for the alleged overcharges.

The Seventh Circuit's reasoning applies precisely to the present case. The relationship between the counties and the municipalities involves a service for which the municipalities and end users have no alternative source. Michigan law requires a 100 percent pass-on of Detroit's charges. The counties are conduits, no more and no less. Under *Panhandle Eastern*, the municipalities or end users, not the counties, have standing to sue for any overcharges.

The Sixth Circuit, in its order denying the petitions for rehearing, expressly rejected the reasoning of the *en banc* Seventh Circuit and adhered to the rigid "fixed quantity" test of the Seventh Circuit panel. A-27, 866 F.2d at 852. In explicitly rejecting the reasoning of the Seventh Circuit, the Sixth Circuit created a clear conflict among the circuits.

The Tenth Circuit has also rendered a decision in conflict with *Panhandle Eastern*. In *In re Wyoming Tight Sands Antitrust Cases*, the Tenth Circuit refused to permit states as *parens patriae* to sue on behalf of gas customers, even assuming arguendo that there was a "perfect and provable pass-on of the allegedly illegal overcharge . . . ." 866 F.2d at 1293.

The decision below, and *Tight Sands*, also conflict with the Fifth Circuit decision in *In re Beef Industry Antitrust Litigation*. The Fifth Circuit in that case permitted offensive use of a pass-on where there is the "functional equivalent" of a cost-plus contract, and rejected "fixed quantity" as the *sine qua non* of a "functional equivalent." 600 F.2d at 1163-64.

This disagreement among the circuits is creating confusion and uncertainty in antitrust enforcement. This Court should grant review to resolve the conflict among the circuits.

II.

THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE WHETHER A PASS-ON DEFENSE EXISTS.

This case squarely presents the question of whether and under what circumstances a defendant may assert a 100 percent pass-on

as a defense. This is an important issue under Section 4 of the Clayton Act left unresolved in this Court's prior decisions.

In *Hanover Shoe,* United Shoe Machinery Corporation sought to defend against a customer's Sherman Act Section 2 claim on the ground that the plaintiff had passed on the illegal overcharge to its customers. While this Court rejected a broad pass-on defense, it

> recognize[d] that there might be situations—for instance, when an overcharged buyer has a preexisting "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present.

392 U.S. at 494.

In *Illinois Brick*, this Court considered whether an indirect purchaser could use the pass-on theory offensively in circumstances where *Hanover Shoe* would preclude defensive use of a pass-on. The Court answered this question in the negative:

> [The rule] regarding pass-on in antitrust damages actions . . . *must apply equally to plaintiffs and defendants.*
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> * * *
>
> We . . . decline to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers.

431 U.S. at 728, 735 (emphasis added). The Court again observed, however, that under *Hanover Shoe*, a defense might be permitted where there is "a pre-existing cost-plus contract." 431 U.S. at 736.

Most recently, in *California* v. *ARC America Corp.*, 109 S. Ct. at 1666 n. 6, this Court reiterated "that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them."

Notwithstanding this Court's equation of offensive and defensive use of a pass-on in *Hanover Shoe, Illinois Brick* and *ARC America*, the Sixth Circuit in its order denying rehearing concluded that "defensive use of a pass-on theory" should be permitted, if at all, in even more limited circumstances than the

"offensive use" at issue in *Panhandle Eastern*. A-27, 866 F.2d at 852.[12] This conclusion not only conflicts with *Panhandle Eastern*, but ignores this Court's reasoning in *Illinois Brick*.

Whether and under what circumstances a 100 percent pass-on may ever be asserted as a defense is an important question which has not been, but should be, resolved by this Court. Because the existence of such a pass-on is uncontroverted in this case, it is an ideal vehicle for the Court's resolution of this issue.

III.

THE DECISION BELOW RAISES IMPORTANT ISSUES AS TO WHO AMONG DIRECT AND INDIRECT PURCHASERS MAY SUE FOR AN ANTITRUST VIOLATION.

The issues raised in this case—both *whether* a pass-on defense exists and *when* a 100 percent pass-on can be used either defensively or offensively—are important to the orderly administration of the federal antitrust laws.

In spite of the fact that the counties passed on 100 percent of any overcharges, the Sixth Circuit granted antitrust standing to the counties on the basis that the counties had a contractual relationship with Detroit:

> The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A-10, 866 F.2d at 845. The Sixth Circuit emphatically answered this question in the negative, notwithstanding that the counties—as dictated by state statute—emerge unharmed from the contractual relationship with Detroit.

If left unreversed, the Sixth Circuit's decision will result in a litany of antitrust suits by administrators or surrogates who have

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[12]See pp. 7-8, *supra*.

passed on 100 percent of alleged damages, without the injured party ever appearing before the court. And when the injured indirect purchaser does appear before the court, as in the present circumstance where municipalities and end users have also filed suit,[13] which party has standing to bring the lawsuit? Or do both the direct and the indirect purchaser have antitrust standing, because one serves as a contractual "conduit" while the other suffers the economic injury?

The Sixth Circuit refused to accept a pass-on defense despite the conceded 100 percent *vertical* pass-on to the municipalities because of supposed difficulties in *horizontal* damage apportionment among the municipalities or end users. A-23; 866 F.2d at 851. Is the Sixth Circuit correct in relying on difficulties in horizontal apportionment of damages as a reason to reject the pass-on? Or was the Seventh Circuit correct that *Hanover Shoe* and *Illinois Brick* were concerned only with vertical apportionment? *See Panhandle Eastern*, 852 F.2d at 893-94, 897.

The Sixth Circuit's opinion is either illogical or inconsistent. It confers standing on parties that have suffered no antitrust damages and denies standing to parties that have suffered 100 percent of the damages. Alternatively, the Sixth Circuit's opinion confers standing on direct purchasers who acted only as a conduit and *at the same time* confers standing on indirect purchasers who bear the antitrust injury as a result of a perfect pass-on. The result is doctrinal inconsistency and serious confusion among litigants and the courts.

The Sixth Circuit not only ignored the truly injured parties in conferring standing on an administrator, but also chose rigidly to apply the "fixed quantity" cost-plus contract language of *Illinois Brick*. Must a pass-on arrangement, to confer standing on the indirect purchaser, always be accompanied by a contractual obligation to purchase a fixed amount of the product? Or, as the Seventh Circuit held, is it enough that the direct purchaser acts like a fixed quantity reseller, with incentive to pass on the entire overcharge? *See Panhandle Eastern*, 852 F.2d at 895-96.

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[13]See note 11, *supra*.

Finally, is the Sixth Circuit correct that there are circumstances where a pass-on may be used offensively, but not defensively? Was this Court incorrect in *Illinois Brick* when it reasoned that the pass-on theory must apply equally to defensive and offensive use? 431 U.S. at 728, 736. The Sixth Circuit has invited this Court to issue a writ of certiorari by rejecting this Court's direction to apply the pass-on theory equally to plaintiffs and defendants.[14]

The Sixth Circuit's rejection of a pass-on defense even where state statute mandates a 100 percent pass-on invites duplicative lawsuits and recoveries by direct purchasers who are only a "conduit" and indirect purchasers who pay 100 percent of the alleged damages pursuant to a perfect pass through. This problem is exacerbated by state antitrust standing statutes repealing *Illinois Brick*, which were upheld in *ARC America*.[15]

This Court should grant certiorari to determine who among direct and indirect purchasers have standing to sue when 100 percent of the alleged damages are passed on. The Sixth Circuit decision squarely presents this question. It is a question that will plague litigants in cases where indirect purchasers seek to sue by asserting a 100 percent pass-on offensively, and in cases where the direct purchaser and its attorneys seek a windfall recovery despite a 100 percent pass-on to indirect purchasers.

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[14]The Sixth Circuit's refusal to allow a pass-on defense despite its concession that *all* costs have been passed on can perhaps be explained by its eagerness to get at the merits of the case even though the case was before it on a preliminary matter. Telling examples include the Sixth Circuit's failure to distinguish between those defendants who have been prosecuted and convicted in prior criminal cases and those who, like Petitioner, the Mayor of Detroit, have been neither prosecuted nor convicted; and the panel's insinuating citation to a Shakespeare sonnet supposedly relevant to "the nature of their crimes and the elements in which these dabblers in sludge and scum worked . . . ." A-7 n. 3, 866 F.2d at 843 n. 3. Petitioner respectfully submits that such innuendos, tending to ascribe guilt by association, are inappropriate considerations for determining standing to sue.

[15]Michigan, fourteen other states and the District of Columbia have enacted "Illinois Brick repealer" statutes. *ARC America*, 109 S. Ct. at 1663 n. 3. In the present case, the municipalities and end users have not only sued through private attorneys, see note 11, *supra*, but have ample incentive to sue through their state attorneys general as *parens patriae*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari.

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APPENDIX

COURT OF APPEALS OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-1200/1217/18/66/67/68/1303/34

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND,
Plaintiff-Appellant,
Cross-Appellee,

and

THE COUNTY OF MACOMB,
Intervening
Plaintiff-Appellant,
Cross-Appellee,

v.

THE CITY OF DETROIT, *et al.*,
Defendants-Appellees,

NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN,
Defendants-Appellees,
Cross-Appellants,

and

COLEMAN YOUNG, *et al.*,
Defendants-Appellees,
Cross-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed January 27, 1989

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

DAVID A. NELSON, Circuit Judge. Oakland County, Michigan, brought a federal antitrust and RICO action against the City of Detroit and its mayor, among others, on account of alleged overcharges for sewerage services. Macomb County, Michigan, was allowed to intervene in the action as an additional party plaintiff.

The prices paid for the sewerage services were a function of the costs Detroit incurred in providing them. The plaintiff counties claimed that these costs were excessive, Detroit allegedly having procured sludge disposal services at inflated prices set in a price-fixing conspiracy, with enough padding to cover illegal kickbacks to city personnel. The complaints also alleged that the counties, as opposed to the City of Detroit, collected sewerage fees from municipalities located within sewerage disposal districts operated by the counties, and the complaints alleged that Detroit was paid not by the local municipalities, but by the counties.

The district court dismissed the complaints on the grounds that the counties lacked standing to sue. The counties were mere intermediaries, the court concluded, and the municipalities bore the full burden of the alleged overcharges when the municipalities paid the bills submitted to them by the counties. The counties thus could not show that they had suffered the sort of "injury in fact" necessary to confer standing under the Constitution, the district court held, just as they could not show that they had been injured in their "business or property" within the meaning of that phrase as used in the statutes on which suit was brought.

Both counties have appealed the dismissal of their complaints, and Oakland County has appealed an order denying its motion to vacate certain protective orders entered in related criminal proceedings. The defendants have cross-appealed an order denying, in part, their motion to quash a subpoena for certain electronic surveillance materials.

Because we think that the plaintiff counties did allege injuries

sufficient to give them standing to sue, we shall reverse the order of dismissal and direct that the complaints be reinstated. We think it would be inadvisable for us to try to resolve the various discovery issues at this stage of the litigation.

I

In 1977 the United States sued the City of Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of federal environmental laws and regulations.[1] A consent judgment was entered, but the United States became dissatisfied with the pace at which Detroit was moving toward compliance. In March of 1979, following issuance of a show cause order, the court made Coleman A. Young, Mayor of the City of Detroit, the "administrator" of the wastewater treatment plant operated by the Detroit Water and Sewerage Department.

Invoking "the broad range of equitable powers available to this court to enforce and effectuate its orders and judgments," the district court transferred all functions relating to operation of the treatment plant to Mayor/Administrator Young, divesting Detroit's Board of Water Commissioners and the city water and sewerage department of authority vested in them under the city charter. The transfer of functions to Mr. Young was accompanied by a grant of what the order characterized as "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit . . . ." *United States v. City of Detroit*, 476 F.Supp. 512, 515 and 520 (E.D. Mich. 1979). The present appeal, like that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (1984), draws in issue

[1] In the last nine years there have been no fewer than 14 published federal court opinions on matters arising out of the operation of Detroit's sewer system. The reader interested in the background is referred to *United States v. Bowers*, 828 F.2d 1169 (6th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1731 (1988); *City of Detroit v. State of Michigan*, 803 F.2d 1411 (6th Cir. 1986); and *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984).

neither the validity of the court's appointment of Mr. Young as administrator nor the validity of the court's decision to vest in him powers which the city charter placed elsewhere. *Id.* at 292.

Acting in his capacity as administrator, Mr. Young entered into contracts for the hauling and landfill disposal of sludge and scum from the city's wastewater treatment plant. Various improprieties in the formation of thse contracts allegedly increased the city's costs and its charges to the counties; those improprieties form the basis for the counties' action against the city, Mr. Young, the sludge haulers, and certain persons associated with them.

* * *

The Detroit sewage disposal system serves not only the city itself, but the outlying counties of Oakland and Macomb. Oakland County, according to the affidavit of its chief deputy drain commissioner, operates three sewage disposal districts embracing some 35 municipalities. The municipalities have individual sewer systems that are connected to interceptor sewers built and operated by the county. The county sewer lines are connected, in turn, to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and arranges for disposal of the residual sludge and other byproducts of the treatment process. Detroit bills Oakland County for the services provided by the city, and Oakland County bills the local municipalities. Detroit is entitled to be paid by Oakland County, as the affidavit establishes, whether or not the municipalities pay the county on time or in full.

The fees Oakland County charges the various municipalities within its three sewer districts are based upon the county's costs. These include costs incurred by the county under its contractual arrangements with Detroit, costs incurred in building, operating and maintaining the county system, and an allowance for reserves.

The allocation of costs among the municipalities is, for a number of reasons, less precise than it might be. The character of the information used in the allocation process varies widely from community to community, for one thing. In some areas there are no individual user meters and no master meters that accurately

record the flow of sewage. Thus in the Clinton-Oakland district the allocation is based on estimated usage multipled by a flat rate, adjusted by a "unit assignment factor." In the Evergreen-Farmington district the allocation for some municipalities is based on master water meters, while for others it is based on totals compiled from individual water meter readings, adjusted by a multiplier. Some Evergreen-Farmington communities have a separate storm water charge, while others do not. Some municipalities lie within two districts, while others lie wholly in one.

In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland County is directly responsible for operation of the local sewer systems in four communities. The County is also a consumer of sewer services; all Oakland County buildings are connected to local municipal sewer systems in the communities where the buildings are located, and Oakland County receives and pays regular sewer bills like any other end-user in those communities.

The municipalities bill their individual residential and commercial customers under a procedure similar to Oakland County's. Each community that operates its own local system allocates the county's charges among its customers, after adding an amount sufficient to cover sewer expenses incurred at the local level.[2]

° ° °

Turning to the specific events out of which the counties' claims arise, the story begins in 1979, when Detroit was seeking new ways of disposing of sludge and scum from its wastewater treatment plant. On May 1 of that year Detroit signed a sludge disposal con-

[2]Macomb County has not provided details similar to those furnished by Oakland County. We are told only that Macomb allocates Detroit's charges proportionately, based on meter readings, and adds a fixed markup. Macomb operates no facilities of its own. To the extent necessary we shall assume, as did the district court, that Macomb County's operations are otherwise similar to those of Oakland County. This does not foreclose the district court from treating the claims of the two counties differently should the facts adduced hereafter warrant it.

tract with defendant Michigan Disposal, a sludge-hauling firm owned by the late Michael Ferrantino. Mr. Ferrantino's estate is a defendant in this action. The contract, which covered only part of the output of the plant, was originally entered into for a term ending on June 30, 1983; the term was later extended to June 30, 1985.

The sludge handled under the Michigan Disposal contract was taken to a landfill owned by Wayne Disposal, another firm controlled by Ferrantino. Michigan Disposal paid Wayne Disposal for the right to use its landfill.

In 1980 Michigan Disposal made an unsolicited proposal for a second sludge-hauling contract, covering the balance of the output of Detroit's plant. The city rejected the proposal, believing that total dependence on a single sludge hauler would be bad policy. Mr. Ferrantino decided to try skinning the cat another way. With defendant Darralyn Bowers, who was a close friend of Mayor Young, Ferrantino contrived a scheme to procure the second sludge-hauling contract for a front company known as Vista Disposal. Also involved in the scheme were defendant Tomlyn, a Michigan Disposal employee, and defendants Cusenza and Valentini. The latter two individuals were employees of Wolverine Disposal, another firm partly owned by Mr. Ferrantino.

Vista Disposal, the front company, was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the sludge hauling industry. Vista submitted a proposal to build a sludge holding pad where sludge could be stabilized and held for up to 12 hours at the treatment plant before being hauled away. The proposal included false statements about Vista's ownership, Owens' experience, and other matters. Mayor Young used his extraordinary court-conferred powers to award the contract to Vista without competitive bidding and without Common Council approval. A subsequent FBI investigation of the Vista scheme led to several of the present defendants being prosecuted and ultimately convicted under the Racketeer Influenced and Corrupt

Organizations Act (RICO), the Hobbs Act, and the federal mail fraud statute.[3]

* * *

Oakland County, soon to be joined by Macomb County, filed the instant civil action in the wake of the criminal investigations. The counties alleged in their complaints that the defendants had conspired to violate the antitrust and racketeering laws, had excluded competition, had illegally fixed the price of sludge hauling, had monopolized the sludge hauling industry, and had imposed illegal overcharges. Relying on § 4 of the Clayton Act (15 U.S.C. § 15) and the cognate provision in RICO, 18 U.S.C. § 1964(c), the counties sought to recover their damages three-fold, along with costs and attorney fees. Each count of each complaint contained a paragraph alleging injury in terms comparable to those in the following exemplar, taken from paragraph 49 of the Oakland County complaint:

> "Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high cost of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct."

Without answering the complaints, the defendants moved for dismissal under Rule 12(b)(6), Fed. R. Civ. P. In an opinion

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[3]Given the nature of their crimes and the element in which these dabblers in sludge and scum worked, Shakespeare could almost have been speaking for the convicted defendants when he wrote, in Sonnet CXI,

"O, for my sake do you with Fortune chide,
The guilty goddess of my harmful deeds,
That did not better for my life provide,
Than public means, which public manners breeds.
Thence comes it that my name receives a brand,
And almost thence my nature is subdu'd
To what it works in, like the dyer's hand. . . ."

reported at 620 F.Supp. 1399, the district court granted the motions. Subsequent motions to alter judgment were denied (see opinion reported at 628 F.Supp 610), and the counties have appealed. Separate appeals on discovery matters have been consolidated with the appeals relating to the dismissal of the action.

II

The district court, as noted above, dismissed the plaintiff counties' complaints for lack of standing. The burden of any unlawful cost increment fell on the municipalities or the ultimate consumers, the court reasoned, and although the counties did pay a portion of the allegedly excessive costs as customers of the municipalities, the counties were not suing as customers of the municipalities, but as administrators of the "enterprise funds" through which the county sewage systems were operated. In the latter capacity, said the district court, the counties simply acted as collection agencies for the City of Detroit, in effect, and not as buyers of sewerage services on their own account. 620 F.Supp. at 1402-03; 628 F.Supp. at 613. The counties had not themselves suffered any injury in fact, the court concluded, and thus had no standing to sue. It seems to us, however, that the counties must be treated as buyers on their own account. As such the counties did have standing, we think, both as a matter of constitutional law and as a matter of statutory law.

Implicit in the district court's suggestion that it was not the counties which purchased the services from Detroit is the notion that the counties were acting merely as agents, rather than as principals—for the court expressly acknowledged that Oakland County, at least, did actually sign contracts with Detroit. 620 F.Supp. at 1400. *Cf.* 628 F.Supp. at 611. But the complaints—which must be accepted as true for present purposes—allege that it was the *counties*, not the municipalities acting through the counties as agents, that were the contracting parties. These allegations have been verified, in the case of Oakland County, by an uncon-

tradicted affidavit attesting to the fact that "Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of [the county's] three sewage disposal districts . . . ." It was the counties, not the municipalities, that were billed by Detroit, and there has been no showing that Detroit was entitled to look to the municipalities for payment. The counties, in our view, must be treated as direct purchasers in their own right.[4]

It is true that in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984), where we concluded that the pendent jurisdiction doctrine could be invoked in the federal government's environmental action to enable the federal court to decide a sewer charge dispute between Oakland County and the City of Madison Heights, we described Oakland County as "an intermediary only, dependent completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292. We also said that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for in the consent judgment." *Id.* at 296. Whether or not the last part of the quoted statement is factually correct, however,[5] our

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[4]The counties seem to argue here, as they did in the district court, that "the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit." 628 F.Supp. at 613. The district court dismissed this argument as an "absurdity," and we agree. It is somewhat reminiscent of the old common law proposition that a man and his wife are one person, the husband being that person.

[5]In the case at bar, Defendant Young filed a brief with the district court attaching as exhibits certain contracts entered into by the City of Detroit, through its Board of Water Commissioners, and Oakland County; the contracts provide that "[t]he COUNTY shall pay the BOARD for sewage treatment and disposal service at such rates as the BOARD may establish from time to time." We have seen in these contracts no indication that the counties would be relieved of responsibility for paying Detroit to the extent that the counties might be unable to collect from the municipalities. The district court recognized in this case that a failure of the municipalities to pay "their contractual obligations to the Counties" would injure the enterprise funds maintained by the *counties*. 628 F.Supp. at 612.

1984 opinion made it clear that "[i]n November 1962 *Oakland County* entered into a contract with the City of Detroit by which Detroit agreed to receive and dispose of sanitary and storm sewage . . . and the *County* agreed to a schedule of payments for this service." *Id.* at 291-92 (emphasis supplied). Our opinion also made it clear that service charges were imposed on the municipalities *by the county*; it was a dispute over the amount of the *county's* charges, after all, that was before us in that case.

Our 1984 decision undoubtedly reflected an understanding that 100 percent of the charges imposed by Detroit on the county were passed on by the county to the municipalities, which would make the county a "conduit" in an economic sense. The decision did not say, however, that the county was an agent rather than a principal in the legal sense. Accordingly, in our view, Oakland County is not collaterally estopped from challenging the district court's suggestion that the counties are not actual buyers of the service sold by Detroit. The counties certainly are buyers, as we see it, and the real question presented here is whether the Constitution or the statutes foreclose the counties from coming into court if one assumes—as we do, for purposes of this opinion—that any and all overcharges were passed on to the counties' own customers, the municipalities.

A

We shall address the constitutional question first. The Constitution makes it clear that the judicial power vested in the federal courts under Section 1 of Article III extends only to "Cases" and "Controversies." U.S. Const., Art. III, § 2. A dispute in which the interest of the complaining party is purely academic does not qualify as a case or controversy in the constitutional sense; the federal courts are not empowered to decide questions posed by officious intermeddlers having no personal stake in the outcome. To satisfy the "case or controversy" requirement of the Constitution, a complaint must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and

the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

A buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury—an "injury in fact," to use the common expression. As Mr. Justice Holmes put it in discussing the antitrust complaint of a city that claimed to have been overcharged on purchases of pipe for its water mains, "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (majority opinion).

Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned. Just such an issue was present in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), and in that case Mr. Justice Holmes—speaking this time for a unanimous Supreme Court—said in effect that the plaintiff who has subsequently passed on the overcharge to his customers is no more deprived of standing to sue than is the claimant whose loss happens to be covered by insurance. *Id.* at 534.

Presented with a similar question in *Adams v. Mills*, 286 U.S. 397 (1932), the Supreme Court (per Brandeis, J.) gave a similar answer. That case was brought by commission merchants who, as consignees of livestock shipped by rail, had been charged illegal unloading fees. The commission merchants sued to recover the unlawful charges notwithstanding that they had already reimbursed themselves out of the proceeds of the sale of the livestock, remitting to their principals only the balance remaining after deduction of the unloading fees. If the defendants exacted an unlawful charge from the plaintiffs, Mr. Justice Brandeis said in explaining why the action would lie,

"the exaction was a tort, for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer. Acceptance of the shipments would have rendered them personally liable to the carriers if the merchandise had been delivered without payment of the full amount lawfully due. As they would have been liable for an undercharge, they may recover for an overcharge. In contemplation of law the claim for damages arose at the time the extra charge was paid. Neither the fact of subsequent reimbursement by the plaintiffs from funds of the shippers, nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers."

Id. at 407 (citations omitted).

Like the Holmes opinion, on which it relied, the Brandeis opinion rejected the argument that the plaintiffs had not been "injured" within the meaning of the applicable statute. Article III was not discussed, but the conclusion that the plaintiffs had been "injured" in the statutory sense necessarily presupposed that the injury was enough to give the plaintiffs the standing required under Article III; if the Court had not believed there was a case or controversy, it could not properly have remanded the matter, as it did, with directions to enter judgment for the plaintiffs. The Court was subsequently to say, indeed, that whether the plaintiff has made out a case or controversy "is the threshold question in every federal case. . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Holmes and Brandeis may have been influenced by concepts of privity that have lately passed out of fashion, but this cannot be said of the court that recently decided *Bacchus Imports v. Dias*, 468 U.S. 263 (1984). The plaintiffs in *Dias* were wholesalers who sought to challenge the constitutionality of an excise tax imposed by the State of Hawaii on wholesale sales of liquor. The plaintiff wholesalers added the full amount of the tax to the full amount of the wholesale prices; the plaintiffs' customers, who were licensed retailers, were charged the wholesale price plus tax. The state

argued that the wholesalers had no standing to challenge the tax because they had not shown that the tax inflicted any "economic injury" on the wholesalers. The Supreme Court rejected this argument out of hand, declaring that the plaintiff wholesalers "plainly" had standing to challenge the tax. *Id.* at 267. (The basis of the challenge was that certain locally produced liquors had been exempted from the tax, with the result that the tax arguably discriminated against interstate commerce.)

The *Dias* court gave two reasons for concluding that the plaintiff wholesalers had shown an injury sufficient to give them standing to contest the constitutionality of Hawaii's tax. In the first place, the Court pointed out,

> "[t]he wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Id.*
>
> "Furthermore," the Court said,
>
> "even if the tax is completely and successfully passed on, it increases the price of [the wholesalers'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

Both of these observations seem pertinent to the situation presented in the case at bar. The plaintiff counties were liable for Detroit's allegedly inflated sewerage charges, just as the plaintiff wholesalers in *Dias* were liable for Hawaii's allegedly unconstitutional tax, whether or not the plaintiffs' customers paid their bills. Even if the plaintiff counties were successful in passing on all of the costs allocated to them, moreover, we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' "business."

The counties may not have been in competition with others for the sale of sewer services, but surely these counties were in com-

petition with other counties in attempting to attract and retain people and/or industry and commerce. We are not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live. The district court believed that "supply and demand do not interact" in this situation because the counties are the only source of sewer services within their respective jurisdictions, 628 F.Supp. 613, but this overlooks the fact that no one is required to live or set up shop in Oakland or Macomb County; there are plenty of other counties in the United States. See *Carter v. Berger*, 777 F.2d 1173, 1177 (7th Cir. 1985). It would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and Oakland County's affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit. Much of the relevant caselaw, indeed, seems to treat the imposition of an unlawfully inflated price on a direct purchaser as an injury *per se*. Nothing in the Constitution requires us to hold that the counties lack standing to sue.

B

In terms variously described as "broad" (*Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983)), "expansive" (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982)), and "sweeping" (*Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1081 (6th Cir. 1983)), section 4 of the Clayton Act, as codified at 15 U.S.C. § 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

A cognate provision in RICO, codified at 18 U.S.C. § 1964(c), provides that:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Are the plaintiff counties proper parties to bring private antitrust and RICO actions under these statutory provisions? We believe they are.

It is not to be gainsaid that the counties are "persons" within the meaning of the antitrust laws. *Chattanooga Foundry v. Atlanta, supra*, 203 U.S. at 396. If they have not been injured in their "business" of furnishing sewer service, moreover, the counties at least sustained an injury in their property when they paid the allegedly excessive charges. *Id.* That injury, as we have seen, was not eradicated for constitutional standing purposes if the excessive charges were subsequently passed on to the counties' municipal customers—and such a passing on of illegal charges does not normally wipe out the injury for antitrust standing purposes either.

In the leading case of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), where the Supreme Court emphatically rejected an antitrust defendant's argument that the plaintiff could have suffered no legally cognizable injury from illegal overcharges that were reflected, in turn, in the prices charged by the plaintiff to its own customers, the Court held that "when a buyer shows that the price paid by him [in a chain of distribution situation] is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." *Id.* at 489. Justice White's majority opinion in *Hanover Shoe* cited *Chattanooga Foundry v. Atlanta*, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, and *Adams v. Mills* with obvious approval, 392 U.S. at 489-90, and while the opinion noted that some lower courts had sustained the "so-called" passing on defense, it pointed out that "[o]thers, beginning

with Judge Goodrich's 1960 decision in the case before us, deemed it *irrelevant* that the plaintiff may have passed on the burden of the overcharge." *Id.* at 490 n. 8 (emphasis supplied).

Judge Goodrich (a highly respected circuit judge who sat as a district court judge in the *Hanover Shoe* litigation) concluded that the "excessive price is the injury." 185 F.Supp. 826, 829 (M.D. Pa. 1960). Justice White explained that it was unnecessary, in Judge Goodrich's view, to determine whether plaintiff Hanover had passed on the illegal burden to the next group in the chain of distribution, "because Hanover's injury was complete when it paid the excessive rentals and because ' "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" ' and to exonerate a defendant by reason of remote consequences. *Id.* at 830 (quoting from *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533, 62 L.Ed. 451, 454, 38 S.Ct. 186 (1918))." 392 U.S. at 488 n. 6, quoting 185 F.Supp. at 830.

The Supreme Court stressed two reasons, in *Hanover Shoe*, for its decision to reject Hanover's assertion of a "passing on" defense. First, proper application of such a defense would entail proof of "virtually unascertainable figures," showing precisely what prices would have prevailed had the overcharges not occurred, what effect price changes would have had on sales, and so on. 392 U.S. at 493. Second,

> "[I]f buyers [were] subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

392 U.S. at 494. (Emphasis in original.)

In the subsequent case of *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), the Supreme Court, again speaking through Justice White, rejected an attempt by indirect purchasers to make offensive use of the "passing on" concept. In holding that the indirect purchasers could not sue to recover the overcharges passed on to them by a middleman, the Court reinforced the construction that *Hanover Shoe* had given § 4 of the Clayton Act. Under that construction, as the Court explained, "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Id.* at 729. In the case at bar, of course, this construction of § 4 points to the conclusion that the overcharged county, and not any municipality or ultimate consumer, is the party injured in its business or property within the meaning of § 4.

It was the "evidentiary complexities and uncertainties" involved in applying the pass-on concept that seems to have been most influential in bringing the Supreme Court to "the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharges in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 732, 735. Acceptance of the pass-on approach, the Court warned, "would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740. Efforts to apportion the recovery among everyone who could have absorbed part of the overcharge "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737.

The *Illinois Brick* court did concede that the difficulties and uncertainties it foresaw would "be less substantial in some contexts than in others." 431 U.S. at 743. In this connection the plaintiffs had argued—with some lower court support—"that pass-on theo-

ries should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids." 431 U.S. at 743. Just such a factual situation had been presented in *Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973), *aff'g* 355 F.Supp. 902 (E.D. Mich. 1972)—and this court, in a brief *per curiam* decision, had accepted the pass-on defense in that case. (The plaintiff in *Obron* was a middleman who purchased mesh bags from defendant Union Camp at a fixed percentage off Union Camp's suggested list price; the middleman then resold at list to customers who took delivery of the bags, without alteration, in "drop shipments" from Union Camp.)

In a passage that implicitly repudiated our *Obron* decision, the *Illinois Brick* court rejected the argument that pass-on theories should be permitted for middlemen reselling goods without alteration and for contractors adding a fixed percentage markup;

> "We reject these attempts to carve out exceptions to the Hanover Shoe rule for particular types of markets.
>
> * * *
>
> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the Hanover Shoe rule without justification."

431 U.S. at 744 (footnote omitted).

Although *Obron* itself would doubtless have been decided differently had it reached us after the Supreme Court's decision in *Illinois Brick*, both *Illinois Brick* and *Hanover Shoe* recognized the possibility that there "might" be situations of a different sort where the considerations requiring rejection of the pass-on defense would not be present. Thus a pass-on defense "might" be permitted, the Supreme Court said, "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged. . . ." 392 U.S. at 494; 431 U.S. at 724 n. 2.

In the case at bar the district court thought that if the counties could be said to be buyers at all, their arrangements with the municipalities constituted, "in essence," pre-existing cost-plus contracts. 628 F.Supp. at 613. Relying in part on our observation in *County of Oakland v. City of Berkley*, 742 F.2d 289, 296 (6th Cir. 1984), that Oakland County was "a mere conduit" through which payment of charges allocated to the municipalities flowed into the coffers of the City of Detroit, the district court decided that it was "easy to prove" that the plaintiff counties had not been damaged. Accordingly, the court concluded, even if the counties could meet the standing requirement, the cost-plus contract exception to the *Hanover Shoe* rule ought to be invoked. 620 F.Supp. at 1402-03.

Mindful, as we were in *Jewish Hospital Assn. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 975 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), "of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule," we are not persuaded that a cost-plus contract exception, assuming it exists, precludes the direct purchaser from maintaining suit in the case at bar. To allow the passing on defense in this particular case, we believe, would invite precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid.

We are not dealing here with a situation in which an antitrust violator has sold a single item to a single middleman who has resold the item under a pre-existing cost-based contract to a single consumer. In a situation of that sort it might well be easy to prove that the burden of the overcharge had been borne solely by the consumer—and in the absence of other consumers, there could not be any problem in determining how to allocate the overcharge at the consumer level.

In the present situation, by contrast, our hypothesis must be that Detroit sold sewerage services, at inflated prices, to counties that resold the services to scores of municipalities; that the counties attempted to pass their costs on to the municipalities under a con-

fusing array of formulae based partly on actual meter readings and partly on estimates; and that the municipalities attempted, in turn, to pass their costs on to thousands of consumers under similar formulae. If both the counties and the municipalities were 100 percent successful in passing all of the overcharges on to the consumers, the logic of the pass-on theory is that the appropriate plaintiffs in this case are not a few dozen municipalities, but thousands of individual householders, businesses, and other consumers. See *Hanover Shoe*, 392 U.S. at 494. "The fact is," as the district court observed in the present case, "that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party." 628 F.Supp. at 612.

For the antitrust violators to be held answerable in damages at all, under the pass-on approach, this case would thus have to be transformed into a massive class action on behalf of a huge group of remote consumers, with or without the municipalities and the counties as additional plaintiffs. The task of determining the actual amount of each individual class member's actual damage would present enormous "evidentiary complexities and uncertainties," to borrow a phrase from *Illinois Brick*, if it would not entail proof of what *Hanover Shoe* called "virtually unascertainable figures."

The risk in adopting the pass-on approach, it seems to us, is not so much that consumers having only a tiny stake in the lawsuit would have "little interest in attempting a class action," *Hanover Shoe*, 392 U.S. at 494, but that self-appointed representatives of the class would have all too much interest in attempting such an action. The net result of our approving the pass-on approach, assuming the class representatives and their counsel would resist the temptation to settle the case for too little, could well be protracted and hard-to-manage class litigation generating large attorney fees, but not necessarily doing much good for any particular individual who did not happen to be a lawyer for the plaintiff class. See *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985). "The class action and the entrepreneurial lawyer may be the best possible solution to some legal problems," *id.*, but we think the solution

of choice for the problem at hand is the solution endorsed by Holmes and Brandeis and White, JJ.: "concentrating the full recovery for the overcharge in the direct purchasers rather than . . . allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Illinois Brick*, 431 U.S. at 735.

We are strongly confirmed in this judgment by the Supreme Court's post-*Illinois Brick* decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). That decision, as we indicated in *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085-86 (6th Cir. 1983), directs us "to consider the § 4 inquiry on a case by case basis," applying the factors that historically have "circumscribe[d] and guide[d] the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." 459 U.S. at 537. The "factors" mentioned in Justice Stevens' majority opinion in *Associated General Contractors* weigh heavily in favor of concentrating the full amount of any recovery in the counties—where the recovery would, presumably, redound to the benefit of the counties' residents, most of whom presumably would have been ultimate consumers of the allegedly overpriced sewerage services.[6]

The first of the factors that favored judicial recognition of the plaintiff's antitrust claim in *Associated General Contractors* obviously favors recognition of the counties' claims here; in this case, as in *Contractors*, "[t]he complaint does allege a causal connection between an antitrust violation and harm to the [plaintiff] and further alleges that the defendants intended to cause that harm." 459 U.S. at 537.

Although an allegation of improper motive "is not a panacea that will enable any complaint to withstand a motion to dismiss," this

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[6]The district court saw no reason why the end users would benefit if the counties' enterprise funds were replenished through a recovery in this litigation. 628 F.Supp. at 613. As we understand it, however, the funds are strictly non-profit, so any recovery would ultimately have to be passed through to the end users via charges lower than those that would otherwise be imposed.

factor "may support a plaintiff's damages claim under § 4. . . ." 459 U.S. at 537 (footnote omitted). It is hard to imagine how improper motives could be alleged any more clearly than they have been in this case.

The next factor on which Justice Stevens found it appropriate to focus in *Contractors* is "the nature of the plaintiff's alleged injury." 459 U.S. at 538. The injury claimed by the plaintiff counties in the instant case is a classic example of precisely the sort of injury with which the antitrust laws were intended to deal; the prices the counties had to pay, according to the complaints, were higher than they would have been had the defendants not broken the law. The fact that the counties' injury, like the injury alleged by the plaintiff in *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982), "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws" is a factor that may in itself be "controlling." *Contractors*, 459 U.S. at 538. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977).

"An additional factor," *Contractors* says, "is the directness or indirectness of the asserted injury." 459 U.S. at 540. As direct purchasers, the counties obviously assert a direct injury.

The state of the law at the time the antitrust statutes were initially adopted makes the direct injury a particularly significant factor. The substance of § 4 of the Clayton Act, as Justice Stevens pointed out in *Contractors*, 459 U.S. at 530, was originally enacted in 1890 as § 7 of the Sherman Act, and "[t]he repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background." *Id.* at 531 (footnote omitted). The doctrine of privity of contract—specifically mentioned in *Contractors* at 459 U.S. 533—was in its heyday in 1890, and *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (quoted in *Contractors* at 459 U.S. 534) stated a truth with which lawyers practicing in 1890 would have beeen totally comfortable when it said that "[t]he general tendency of the law, in regard to damages at least, is not to go

beyond the first step." The generation of which Senator Sherman and Mr. Justice Holmes were both members would have been unsympathetic to the view that the City of Detroit could be sued for damages, in a situation such as that presented here, by any entity with which the city did not have a direct contractual relationship.

The damages claim of the plaintiff in *Contractors* was found to be "highly speculative," a factor that cut against recognition of the plaintiff's action. 459 U.S. at 542-43. The claims of the counties in the case at bar, on the other hand, are obviously less speculative than the claims of remote consumers who, unlike the counties, may have had their individual charges computed on the basis of estimates and arbitrary formulae.

The next factor identified in *Contractors*—"the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits," 459 U.S. at 543—is one we have already addressed. A straightforward action by Oakland and Macomb counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers whose individual claims would present extraordinary complexities. If "the risk of duplicate recoveries" is minimal in this case, "the danger of complex apportionment of damages" (459 U.S. at 544) certainly is not. The task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their places of residence.

Although we have focused primarily on the antitrust laws in the foregoing discussion, most of what we have said is applicable also to the treble damage provision of RICO, 18 U.S.C. § 1964(c), a provision patterned directly on § 4 of the Clayton Act. If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations. See *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985), and *Terre Du Lac Association v. Terre Du Lac, Inc.*, 772

F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). Under both statutes, on the facts that we are required to assume here, the counties are indeed the proper parties to bring suit. The complaints should not have been dismissed.

III

The various discovery issues raised by the parties are entirely unrelated to the standing issue, and both the protective order from which Oakland County appeals and the order denying in part a motion to quash various subpoenas, from which certain defendants cross-appeal, are interlocutory orders that would not ordinarily be immediately appealable. Indeed, we have previously dismissed attempts to take immediate appeals from these very orders. We think it would be premature to undertake appellate review of the discovery orders before the case is even at issue.

The order granting the defendants' motion for summary judgment is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

COURT OF APPEALS ORDER DENYING REHEARING

Nos. 86-1200/1217/18/66/67/68/1303/34

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE COUNTY OF OAKLAND, Plaintiff-Appellant, Cross-Appellee, and THE COUNTY OF MACOMB Intervening Plaintiff-Appellant, Cross-Appellee, v. THE CITY OF DETROIT, et al., Defendants-Appellees, NANCY ALLEVATO, MICHAEL J. FERRANTINO, SR., WAYNE DISPOSAL, INC., CHARLES CARSON, MICHIGAN DISPOSAL, INC., and WALTER TOMLYN, Defendants-Appellees, Cross-Appellants, and COLEMAN YOUNG, et al., Defendants-Appellees, Cross-Appellants.	ORDER

Before: MERRITT and NELSON, Circuit Judges, and CONTIE, Senior Circuit Judge.

The court having received the defendants' various petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on any of the three suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

After receipt of the petitions for rehearing, we requested that petitioner City of Detroit furnish a record citation for a purported contract that was quoted and relied on heavily in the city's petition for rehearing. The city conceded that the contract was not part of the record, but the city moved to enlarge the record by adding both the contract quoted in the petition for rehearing and a later contract. The plaintiffs have responded in opposition to the motion.

The city had ample opportunity to present this evidence in a timely manner in the district court. It did not do so. Neither did the city move to correct or modify the record pursuant to Fed. R. App. P. 10(e) at the time this case was originally heard. The attempt to change the record after an adverse decision had been rendered by the court of appeals simply came too late. See generally 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3956 (1977). The City of Detroit's "motion to add documents to record" is DENIED.

If we had been prepared to accept the tendered contracts, it would not have led us to grant rehearing in this case. In our original opinion we assumed, for purposes of the opinion, "that any and all overcharges were passed on to the counties' own customers, the municipalities." Slip op. at 11. The contracts simply confirm what we had already assumed.

The contracts in question do not affect the constitutional standing issue. The initial purchaser in a chain of distribution does not lack standing in a constitutional sense if charges are passed down the line. As we noted in our original opinion,

> "[e]ven if the plaintiff counties were successful in passing on all the costs allocated to them, . . . we see no constitutional impediment to their litigating the issue (assuming it is even relevant) of whether excess costs attributable to the defendants' misconduct had an adverse impact on the counties' 'business.' " Slip op. at 14.

The question of whether a plaintiff has standing to sue under the antitrust laws depends largely on prudential considerations, including the importance of construing the antitrust laws in a way that preserves the effectiveness of the private antitrust action and furthers the orderly administration of justice. If the counties are not appropriate plaintiffs because they passed their costs on to municipalities, surely the municipalities, which in turn passed their costs on to individual residential and commercial customers, are not appropriate plaintiffs either. We continue to believe that "[e]fforts to apportion the recovery among everyone who could have absorbed part of the overcharge 'would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.' " Slip op. at 16 (quoting *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 737 (1977)).

Furthermore, the *Illinois Brick* Court's observation that a cost-plus contract exception "might be permitted" was limited to contracts for a fixed quantity. 431 U.S. at 736. Although at least one court has been prepared to read the cost-plus exception more broadly in cases involving offensive use of a pass-on theory, see *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir. 1988) (en banc), *cert. denied*, __ U.S. __, 102 L.Ed.2d 573 (1988), we do not think the purposes of the antitrust laws would be well served by reading the cost-plus contract exception so broadly in a case involving the defensive use of the pass-on theory.

We have also reviewed the petitions for rehearing filed by the other defendants, and we conclude that all of the questions

addressed in those petitions were fully considered upon the original submission and decision of this case. The petitions for rehearing are DENIED.

ENTERED BY ORDER
OF THE COURT
[filed April 19, 1989]
/s/ LEONARD GREEN, *Clerk*

DISTRICT COURT OPINION GRANTING MOTION TO DISMISS

COUNTY OF OAKLAND, by George W. KUHN, the Oakland County Drain Commissioner, Plaintiff,

and

County of Macomb, by Thomas S. Welsh, the Macomb County Public Works Commissioner, Intervening Plaintiff,

v.

The CITY OF DETROIT, Coleman A. Young, Charles Beckham, Nancy Allevato, as Personal Representative for the Estate of Michael Ferrantino, Darralyn Bowers, Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Vista Disposal Inc., Michigan Disposal, Inc., Wayne Disposal, Inc., Wolverine Disposal, Inc., and Wolverine Disposal-Detroit, Inc., Defendants.

Civ. A. No. 84-1068.

United States District Court,
E.D. Michigan, S.D.

Oct. 31, 1985.

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

Facts[1]

Oakland County enters into contracts with the City of Detroit and the Detroit Water and Sewerage Department (DWSD) for the transportation, treatment, and disposal of sewage. The work is performed by the Detroit Waste Water Treatment Plant (DWWTP). Detroit charges Oakland County according to the costs incurred by

[1]This section discusses the facts as *alleged* in the complaint. These are by no means findings of fact.

Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from its municipalities and pays Detroit.

The United States, in 1977, brought a civil action against Detroit and DWSD for violation of federal laws regulating discharge of pollutants. The parties entered into a consent judgment in which the defendants agreed to comply with the federal regulations by upgrading DWWTP. Mayor Young was appointed administrator of the DWWTP to speed up compliance.

Prior to 1979, sludge removed from sewage had been incinerated or discharged into the Detroit River. After 1979, because of the consent judgment, increasing amounts of sludge were required to be disposed of. As a result, Detroit entered into a contract with Michigan Disposal, owned by defendant Ferrantino, for hauling and disposal by landfill. As increasing amounts of sludge were needed to be disposed of, DWSD realized another contract would be necessary.

Michigan Disposal submitted an unsolicited proposal to increase its volume of disposal. DWSD rejected the proposal. Thereafter, Ferrantino and Michigan Disposal decided to establish a front company that would hide the interest of Ferrantino and Michigan Disposal to secure the second sludge disposal contract. Bowers, confidant of Young and Beckham, agreed to advance the scheme that was set forth. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens agreed to form the front company to be known as Vista Disposal Inc., which Owens would falsely hold himself out as owning.

On May 9, 1980, Vista submitted to Beckham its hauling and disposal proposal. Bowers, using her influence as friend of Young and Beckham, tried to speed the consideration and grant the proposal. Young and Beckham agreed to grant the proposal. At the time they did so, they knew or should have known that Vista was a mere front company.

Beckham announced to David Fisher, an employee of DWSD, that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit public bids on such

contracts, and to award the contract to the lowest qualified bidder. Beckham rejected this procedure and instead merely requested Requests for Qualifications. DWSD, through Beckham, then notified Vista that it had been selected.

Carson, Vista's attorney, negotiated the terms of the contract with the City. Bypassing the City Council, Young, purportedly acting under his authority as Administrator of DWWTP, approved the contract. Thereafter, Bowers paid money to Beckham for his aid and influence. Vista then entered into a joint venture with Wolverine-Detroit to perform the contract.

Based upon the above allegations, plaintiffs brought three charges. Counts I and II charge violations of the Sherman Act. Counts III-VII charge violations of RICO. Last, Count VIII charges Coleman Young with Breach of Fiduciary Duty.

Motions to dismiss have been filed as to each Count. For the reasons stated below, the motions are granted.

Antitrust Counts

Defendants have brought motions to dismiss plaintiffs' antitrust counts for several reasons. The threshold issue which must be addressed is that of standing. The action alleges in Counts I and II that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1973), by fixing the price for disposal sludge, excluding competition for disposal sludge, and monopolizing the hauling and disposal of sludge. The Counties have not sued as *parens patriae* on behalf of their citizens because Congress has specifically delegated this power to the various State Attorney Generals. Rather, the Counties maintain that they, themselves, were injured by defendants' actions as direct purchasers.

Plaintiffs allege that they were injured in that the charges collected by Detroit for the treatment and disposal of their sewage have been unlawfully inflated as a result of defendants' antitrust violations. Defendants maintain that plaintiffs have suffered no injury because any inflated sums are collected from the individual municipalities, i.e., they are "passed on" to the customer. This "passing on" defense arises where a middleman sues the seller of a

good or service for an antitrust violation. The defense provides that the middleman is not injured because it passes on any inflated prices to the consumer and the middleman has no standing as it has no loss. It is axiomatic that the Constitution requires that plaintiffs must allege an "injury in fact" to have standing to sue. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973). Further, standing requirements must be affirmatively pled in the complaint. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The leading case on the "passing on" defense is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Hanover*, the court found that United Shoe had violated section 2 of the Sherman Act by virtue of its leasing of and refusing to sell certain shoe machinery which, in turn, caused inflated prices to Hanover Shoe. United Shoe attempted to assert the "passing on" defense against Hanover Shoe, alleging that Hanover merely passed on any inflated prices to its customers.

The court rejected the "passing on" defense in that case, noting that so long as Hanover Shoe paid more than it should, its profits were lower than they would have been without the illegal activity. Although the court in *Hanover* severely restricted the "passing on" defense, it did not abandon it. The court said:

> We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing on defense not be permitted in this case would not be present. *Id.* at 494, 88 S.Ct. at 2232.

Thus, the "passing on" defense, though limited, is still viable in certain situations.

The Sixth Circuit analyzed the "passing on" defense in *Obron v. Union Camp Corporation*, 477 F.2d 542 (6th Cir.1973). The court of appeals adopted Honorable Philip Pratt's memorandum opinion at 355 F.Supp. 902 (E.D.Mich.1972). In *Obron*, the defendant,

Union Camp, manufactured mesh bags used by produce packagers. Obron, a distributor of these bags, would obtain an order from a customer and then submit it to Union Camp. The bags were sent directly from Union Camp to the customer. Union Camp would then bill Obron at 5% under list price and Obron would bill the customer at the list price. Obron sued Union Camp for Sherman Act violations arising out of the enforcement of an invalid patent.

In allowing the use of Union Camp's "pass on" defense, the district court said, "the crucial issue here is whether the circumstances of the case create a situation where it would be easy to prove that an overcharged buyer has not been damaged". 355 F.Supp. at 906. The court held that the contract was so strikingly similar to a pre-existing cost plus contract that the defense would be allowed. Obron, rather than being injured by defendant's actions, actually profited from them because it recovered, in effect, a sales commission percentage of the cost. Obron had no control over what price was charged customers. Thus, the reasoning of *Hanover*, that plaintiffs could have charged the inflated price without the higher cost and, thus, increased their profits, was inapplicable.

The issue in this case is whether the circumstances are such that proof that any overcharged buyers (i.e., the Counties) have not been damaged is easy to prove. To determine this, an analysis of the contractual relationships involved is necessary. As discussed in paragraph 20 of Plaintiff Oakland County's Complaint:

> Detroit charges Oakland County according to the cost incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit.

The same type of relationship is discussed in paragraph 20 of Macomb County's Complaint.

This relationship was described by the Sixth Circuit in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir.1984). In that case, Oakland County, which was responsible for collecting

charges from the municipalities that used the City of Detroit's sewage disposal system, brought suit against Berkley for declaration of amounts owed by it. In discussing the contract between the County of Oakland and the City of Detroit in which the City of Detroit agreed to receive and dispose of sanitary and storm sewage from the municipalities involved, the court held: "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit". *Id.* at 292. Further, the court held that: "Since Oakland County is a *mere conduit* for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would *result in Detroit's receiving less money* for sewage disposal than was assumed and planned for . . . ." *Id.* at 296 (emphasis added).

[1] In applying the relationship of the parties to the law concerning the "passing on" defense, it becomes clear that the plaintiffs have not alleged the requisite damages to maintain standing in this matter. The Counties sustain no injury because they are only an intermediary. Thus, they derive no profit level which could be injured by the defendants' actions. In effect, the Counties are not really passing on inflated prices to the municipalities because they are not buyers of the service. Rather, the allegedly inflated prices are aimed directly at the municipalities and the Counties merely collect the sums necessary to pay those charges. The Counties are, in a sense, mere collection agencies. The Court, therefore, holds that the Counties do not allege facts sufficient to meet the Constitutional standing requirement of an "injury in fact". There is nothing in the complaints indicating that they suffer an injury.

Further, from a theoretical standpoint, this is a perfect example of when the exception to the *Hanover Shoe* rule should be invoked.[2] The Court's reasons in *Hanover Shoe* for allowing a

[2]See E. Schaefer, *Passing-On Theory in Anti-trust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.Rev. 883 (1975); R. Harris & L. Sullivan, *Passing on the Monopoly Overcharge, a Comprehensive Policy Analysis*, 128 U.Pa.L.Rev. 269 (1979).

middleman to recover without deduction for "passing on" were the difficulties of the calculation of the overcharge to all the affected customers and the discouragement to the ultimate consumer's suit where he is too little affected to sue. Neither of these problems is present here. Since the municipalities are charged directly for the services rendered, it is no more difficult to trace any overcharges if the consumers (the municipalities) sue than if the Counties sue. Further, if the allegations are true, the municipalities have been significantly affected; thus, there is sufficient incentive for them to sue.

Aside from this inquiry into whether or not there is Constitutional standing, there is a separate inquiry whether the plaintiffs have standing under section 4 of the Clayton Act. As the Supreme Court noted in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983):

> Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a *further* determination whether the plaintiff is a proper party to bring a private antitrust action.

Id. 103 S.Ct. at 907 (emphasis added). So even assuming that plaintiffs had alleged sufficient "injury in fact" for constitutional purposes, and this Court holds that they have not, they would have only cleared the first hurdle. They would also need to show standing as a matter of antitrust law. As interpreted by the Sixth Circuit in *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir.1983), the factors to be considered in determining antitrust standing are:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;

(3) the directness or indirectness of the injury, and the related injury of whether the damages are speculative;

(4) the potential for duplicative recovery or complex apportionment of damages; and

(5) the existence of more direct victims of the alleged antitrust violation.

Id. at 1085. In *Southaven*, it was alleged that defendant Malone intentionally monopolized the food market industry in its local geographic area. When defendant became aware that plaintiff had a tenant prepared to immediately compete in the relevant grocery market, it refused to surrender the premises to Southaven. The Sixth Circuit, applying the factors outlined above, held that Southaven was not a proper antitrust plaintiff.

[2] This Court, applying these factors to this case, finds the Counties are not the proper antitrust plaintiffs. The first three factors discuss the nature of a plaintiff's injuries. As discussed above, the Court holds that plaintiffs have alleged no injury whatsoever; therefore, the first three factors militate against a finding of standing. The fourth factor is whether there is the potential for duplicative recovery. Without needing to decide, the Court notes that the municipalities involved, the citizens of the Counties, and competitor sludge disposal companies might be able to recover for the alleged antitrust violations. Thus, the potential exists. Last, as to the fifth factor, the municipalities, which pay the allegedly inflated amounts which the Counties merely collect, are the direct victims of the alleged violation. The cost is charged directly to them and the Counties merely collect the sums. Application of the *Southaven* factors, then, further supports this Court's finding of a lack of standing on behalf of the Counties.

RICO Counts

[3] RICO provides remedies to anyone "injured in his business or property by reason of a violation of section 1962". 18 U.S.C. § 1964(c). For the reasons stated above, the Court holds that plaintiffs do not have standing to sue. They have not been injured by any of the defendants' alleged activities. As held in *County of Oak-*

land v. City of Berkley, 742 F.2d 289 (6th Cir.1984), "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities . . . to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for". *Id.* at 296. Thus, it is the municipalities who are injured by the inflated prices and, if they do not pay the higher prices, then the City of Detroit takes the loss. Thus, the Counties are acting solely as collectors of these sums and are not injured.

Breach of Fiduciary Duty

[4] Plaintiffs have sued Coleman A. Young for breach of his fiduciary duty as court-appointed Administrator of the DWWTP. Again, plaintiffs allege in paragraph 92 of their respective complaints that their injuries are the unconscionably inflated prices paid for the treatment and disposal of sewage. For the reasons set forth above, the Court holds that the Counties are not injured and, therefore, plaintiffs' counts for breach of fiduciary duty should be dismissed.

An appropriate order will be entered.

DISTRICT COURT ORDER GRANTING MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COUNTY OF OAKLAND, by George W. Kuhn, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION
No. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS ALL COUNTS OF THE COMPLAINT

For the reasons set forth in the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss all Counts of the Complaint are GRANTED.

/s/ RICHARD F. SUHRHEINRICH
United States District Judge

Dated: October 31, 1985

DISTRICT COURT OPINION DENYING MOTION TO ALTER JUDGMENT

COUNTY OF OAKLAND, by George W KUHN, the Oakland County Drain Commissioner,—Plaintiff,

and

County of Macomb, by Thomas S. Welsh, the Macomb County Public Works Commissioner,—Intervening Plaintiff,

v.

The CITY OF DETROIT, Coleman A. Young, Charles Beckham, Nancy Allevato, as Personal Representative for the Estate of Michael Ferrantino, Darralyn Bowers, Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Vista Disposal Inc., Michigan Disposal Inc., Wayne Disposal Inc., Wolverine Disposal Inc., and Wolverine Disposal-Detroit Inc.,—Defendants.

Civ. A. No. 84-1068.

United States District Court,
E.D. Michigan, S.D.

Feb. 5, 1986.

MEMORANDUM OPINION

SUHRHEINRICH, District Judge.

On October 31, 1985, this Court granted summary judgment for defendants in this matter, finding that Oakland and Macomb Counties were not the proper parties to bring suit, 620 F.Supp. 1399. The Counties, pursuant to Fed.R.Civ.P. 59(e), have moved to alter this judgment. The Counties maintain that this Court misunderstood the relationships at issue in this case, and that these relationships confirm their standing to sue. To the contrary, the Counties' briefs, which discuss these relationships, merely serve to confirm that the Court did understand the relationships and that its granting of summary judgment was proper.

Macomb County adopts the brief of Oakland County in this motion. However, it is unclear whether the relationships between the relevant parties are identical in the two Counties. For purposes of this motion, the Court will consider that they are.

The relevant relationships, as described by the Counties, are as follows. The Counties contract with Detroit for sewage disposal. The Counties, by statute, own, operate, and administer the sewer systems that connect the sewer systems to Detroit's interceptors. The Counties determine the cost of maintaining the interceptor system, add that cost to the Detroit charges, and then bill the municipalities. The Counties then collect the aggregate fees charged to the municipalities and then pay Detroit from the specific, segregated sewer Funds maintained by the County for each of the three County sewer Districts. It is these Funds that the County seeks to protect by this suit. Similarly, the fees charged the municipalities by the County are paid by the municipalities from their own segregated sewer funds supported exclusively by user fees.

The conclusion that plaintiffs wish to draw from these facts is that the Funds are directly and adversely impacted by the illegal overcharges described in their complaint. These funds, plaintiffs argue, are the ultimately injured entities. The Court disagrees. The Court appreciates and understands the statutorily mandated, active role which the Counties play in the administration of the metropolitan sewer system. However, this alone is not evidence of injury.

[1] The Counties have misconstrued the cause and effect of any dissipation of the Funds which they maintain. The plaintiffs determine the cost of maintaining their interceptor systems, add this to the charges of the City of Detroit, and send an aggregate bill to the municipalities. Any dissipation of the Funds is caused by the failure of the municipalities to pay their contractual obligations to the Counties. The Funds are not injured by the upstream actions of defendants herein; rather, they are injured by the downstream actions of the municipalities and end users. Perhaps a more proper

cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities.

Another concern of this Court, as discussed in its first memorandum opinion, is that of duplicative recovery. The municipalities operate in the same manner as the Counties, i.e., they maintain segregated funds. If the situation were as plaintiffs posit, the municipalities' funds would similarly be dissipated. Thus, under plaintiffs' scheme, the municipalities could maintain a concurrent cause of action. Further, the end users' "funds" would likewise be dissipated. They, too, could presumably maintain an action. Thus, there is great potential for duplicative recovery.

The fact is that the end users, because they have no one to whom they can pass on their costs, are the ultimately injured party. The plaintiffs and municipalities are really no more than conduits between Detroit and the end users. It is the end users who must pay any alleged overcharges.

The plaintiffs argue that permitting them, rather than the municipalities or the end users, to bring suit will avoid the problems identified in *Hanover Shoe* and *Illinois Brick*. First, the Counties contend that it is easier for them to trace the alleged overcharges. However, the simple ability to trace the overcharges does not establish the crucial element—injury. Further, the records are just as available to the municipalities and, perhaps, to the end users, which would permit them to trace their overcharges. Second, plaintiffs contend that the individual end users do not have the same incentive, expertise, and resources to bring this action. However, the Supreme Court has, in a similar case, held just the opposite. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184 (1972), the Court stated:

> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the effi-

> cacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. . . . The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.

This type of action, then, would install the actually injured parties as plaintiffs, would avoid duplicative recovery, eliminate tracing problems, and provide sufficient resources to maintain suit.

The Counties then argue that, in a sense, they are suing on behalf of the end users, who will benefit by plaintiffs' recovery. The Court has four responses. First, this argument is inconsistent with plaintiffs' contention that it is not a mere conduit for the municipalities and end users. Second, plaintiffs have maintained throughout the proceedings that they are not suing on behalf of the end users (*see* Memorandum on Behalf of Oakland County in Opposition to the Motions to Dismiss Antitrust Counts, p. 6, fn. 1). Third, Congress has established that only a state, acting through its attorney general, may sue as *parens patriae* of its citizens. 15 U.S.C. § 15c(a)(1) (Supp.1983). Fourth, and most importantly, plaintiffs show no reason, and the Court sees no reason, why the end users would benefit by recovery by the Funds.

[2] Oakland County then tries to argue that it itself is an end user of the sewage services and has standing to sue in that capacity. Paragraph 18 of the affidavit of Robert H. Fredericks II establishes that "Wastes from County buildings are discharged into municipal systems which are part of the three Districts. Oakland County pays the respective municipalities for their services just as any other user". The Court agrees that Oakland County would have standing to sue in this capacity. However, there are two problems. First, a fair reading of the Complaint shows that the Counties were not suing in this capacity, but were suing as administrators of the sewage system Funds. Second, if such an action were to be brought, the Counties would be limited to treble damages only for the alleged overcharges attributable to them as end users.

The Counties, in their motions to alter judgment, renew their argument that their "injuries" are redressable under *Hanover Shoe* and *Illinois Brick*. The Court adequately addressed this argument in its first opinion. To the extent new arguments are raised by plaintiffs, however, it will do so again.

[3] Plaintiffs initially argued that the "pass-on" defense was inapplicable here. Now plaintiffs contend that there is no "pass-on" because, in effect, there is no resale. This is because the Counties, the municipalities, and the end users are really one party contracting with the City of Detroit. The absurdity of this argument is shown by *County of Oakland v. City of Berkley*, 742 F.2D 289 (6th Cir.1984), where the County sued Berkley to recover unpaid sewage funds. If, indeed, the parties are really one and there is no resale, why would Oakland bring suit to recover Berkley's contractual obligations? Further, *Berkley* established that if a municipality does not pay its share, either the other municipalities or the City of Detroit, and not the Counties, pick up the slack. Thus, the plaintiffs' argument that they are one with the municipalities and end users fails. Also, it is inconsistent with the Counties' argument that they are not mere conduits.

Plaintiffs further argue that this case is identical to *Illinois Brick* and *Hanover Shoe* and that the "pass-on" defense should not apply for this reason. However, as this Court has previously pointed out, this case differs in two important respects. First, the fundamental reason for not allowing the "pass-on" defense is that the direct purchaser is injured even where he can "pass on" overcharges to an indirect purchaser. This is because he is "passing on" the overcharges at inflated prices, which, when supply and demand interact, reduces the demand for his product. Here, because plaintiffs are monopolies, supply and demand do not interact. Thus, they are uninjured by the alleged overcharges.

Second, the "cost plus" exception, as discussed in *Obron v. Union Camp Corporation*, 355 F.Supp. 902, 907 (E.D.Mich.1972), *aff'd*, 477 F.2d 542 (6th Cir.1973), is applicable here where it was not in *Hanover Shoe* and *Illinois Brick*. Here, the Counties take the cost of the Detroit charges, add that to the

cost of maintaining their systems, and bill the municipalities. In essence, this is a pre-existing "cost plus cost" contract. The Counties have no incentive to absorb any overcharges. Thus, the Counties suffer no injury and lack standing. This is exactly the situation where the exception to *Hanover Shoe* and *Illinois Brick* for cost plus contracts should apply. In essence, plaintiffs are not initially injured and, thus, have no injury to "pass on". They simply serve as an intermediary between the municipalities and Detroit. Plaintiffs are not initially injured by any overcharges because it is not their obligation to pay them. They simply act as bill collectors for the City of Detroit. Thus, either the municipalities or end users who must pay the bills or Detroit itself (which absorbs the charges when unpaid) are injured.

The cases cited by plaintiffs in support of their argument that the "pass-on" defense should not apply are easily distinguishable. In *City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F.Supp. 1320 (N.D.Ohio 1980), plaintiff, a City municipal utility that purchased electricity from defendant and sold it to citizens, was held to have standing to sue. The critical difference between that case and this case is that there, as that Court noted, the plaintiff City of Cleveland had an incentive to absorb part of the overcharge: its need to attract customers. *Id.* at 1324-25. Here, however, there is no such incentive because plaintiffs have monopolies. Thus, if they pass on inflated prices, they need not worry about losing business to other customers. Similarly, *Jewish Hospital Ass'n v. Stewart Mechan. Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S 966, 101 S.Ct. 1483, 67 L.Ed.2d 615 (1981), was a case where, unlike here, the plaintiff had an incentive to absorb the overcharge. *Id.* at 975-77. In sum, the Court agrees that *Hanover Shoe* and *Illinois Brick* favor antitrust suits by the direct purchasers. However, this is a situation where such a presumption does not apply.

Plaintiffs' argument that *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), authorizes a suit such as this (at p. 4 of Oakland's Reply Memorandum in Support of

Motion to Alter Judgment) seriously miscontrues that case. *Hawaii* simply holds that § 4 of the Clayton Act authorizes a state to sue either in its proprietary capacity as a consumer in the marketplace or for injury to its general economy, but not both. *Id.* at 262-3, 92 S.Ct. at 891-92.

As discussed earlier in this opinion, plaintiffs are not suing in their proprietary capacity as consumers in the marketplace. If they were, their damages would be limited to the overcharge attributable to them as end users. Rather, plaintiffs are suing as administrators of the sewage system.

Further, plaintiffs are not suing for injury to their general economy. Plaintiffs have always maintained that they are not suing on behalf of their citizens and such *parens patriae* suits are limited to the states.

[4, 5] The Court must also clear up another misconception. Plaintiffs seem to be of the opinion that this Court found the municipalities were the proper party to bring suit. The issue of the municipalities' standing is not now, and has never been, before this Court. The Court has discussed the potential standing of other entities to show potential for duplicative recovery and to help show why the Counties do not have standing. It would be improper for the Court to rule on the standing of any party not before it. The Court also notes that Macomb County's request for the substitution of the municipalities for the counties pursuant to Fed.R.Civ.P. 17(a) is an improper use of that rule.

[6] The Court also wishes to reiterate its discussion of *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir.1983) where the court found the following factors relevant to determining antitrust standing:

(1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;

(2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;

(3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;

(4) the potential for duplicative recovery or complex apportionment of damages; and

(5) the existence of more direct victims of the alleged antitrust violation.

Relating these factors to the case at bar, it is clear that plaintiffs do not have standing:

(1) The cause of any harm to the plaintiff is the failure of the municipalities to replenish the funds. There is no allegation that any harm was intentional;

(2) Plaintiffs are not competitors in the relevant market. They are consumers only to the very limited extent of the fees they pay for end use;

(3) Any injury plaintiffs may suffer is indirect through the inability of the municipalities to pay their bills;

(4) There is great potential for duplicative recovery; and

(5) The municipalities and end users are more direct victims of any antitrust violations.

[7] The Court wants to emphasize that it makes no finding whatsoever as to the existence of an antitrust violation. Further, the Court does not deny that the Counties play a very significant role in the administration of the metropolitan sewage system. However, plaintiffs have been unable to allege the existence of an antitrust injury. In a matter that involves the potential recovery of a substantial amount of damages, the Court feels that the party bringing suit, and potentially recovering, must be one injured by the alleged violations.

RICO Claims

Plaintiffs also move to alter this Court's dismissal of their claims under RICO. The Court granted dismissal because plaintiffs did not allege the prerequisite of injury to have standing. RICO, and the issue of standing, have recently been addressed by the Supreme Court. In *Sedima, S.P.R.L. v. Imex Co.*, __ U.S. __, 105

S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985), the Court held:

> . . . plaintiff only has standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

[8] There exists the requirement under RICO, as under the antitrust acts, that the plaintiff must suffer an injury by defendants' actions before it has standing to sue. Here, as discussed above and in the Court's original Memorandum Opinion, plaintiff simply has not been injured by defendants' conduct. Any injury the Counties suffer is a result of the municipalities not fulfilling their contractual obligations. Further, the relationships between the parties, as described in *Berkley* and by plaintiffs, establishes that any failure to pay by a municipality will result in the other municipalities or the City of Detroit picking up the slack. Thus, the Court does not find any possibility of injury to the Counties by defendants' conduct.

Terre Du Lac Assoc., Inc. v. Terre Du Lac, 772 F.2d 467 (8th Cir.1985) does not change this result. In *Terre Du Lac*, plaintiff was a property owners' association complaining about the costs of failing to maintain roads in a subdivision. The Court held that, in that case, plaintiff did not lack standing merely because it may pass its injuries on to its members. Certainly, the Court did not abandon the constitutional requirement of an injury in fact.

Further, *Terre Du Lac* is distinguishable. In that case, the Association suffered an injury and then passed the injury along to its members. Here, the Counties do not suffer an injury which can be passed along to the municipalities. Rather, the Counties serve as mere bill collectors for the City of Detroit. If they are unable to collect, the Counties do not suffer. Rather, any injuries resulting from defendants' conduct, either directly or indirectly, is borne by the municipalities and/or end users. Thus, the Counties suffer no injury which can be passed along.

An appropriate order, in accordance with this Memorandum Opinion, will be entered.

DISTRICT COURT ORDER DENYING MOTION TO ALTER JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE COUNTY OF OAKLAND by GEORGE W. KUHN, the Oakland County Drain Commissioner,
Plaintiff,

and

COUNTY OF MACOMB, by Thomas S. Welsh, the Macomb County Public Works Commissioner,
Intervening Plaintiff,

v.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC.,
Defendants.

CIVIL ACTION
NO. 84-1068

HON. RICHARD F. SUHRHEINRICH

ORDER DENYING PLAINTIFFS' MOTION TO ALTER JUDGMENT

In accordance with the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that plaintiffs' motion to alter judgment is DENIED.

/s/ RICHARD F. SUHRHEINRICH
United States District Judge

DATED: February 5, 1986

(7) (2) (2)

No. 89-56 No. 89-79 No. 89-101

In The Supreme Court of the United States

October Term, 1989

Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., *et al.* (Petitioners in No. 89-56), The City of Detroit (Petitioner in No. 89-79), and Coleman A. Young (Petitioner in No. 89-101),

Petitioners,

v.

The County of Oakland and The County of Macomb,

Respondents.

THE COUNTY OF MACOMB'S BRIEF OPPOSING THE PETITIONS OF NANCY ALLEVATO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.*, THE CITY OF DETROIT, AND COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether, because of the sparse substantive record in this case and its interlocutory posture, the issues presented merit present review by this Court?

II.

Whether the Respondent Counties which were the overcharged direct purchasers of sewerage services have standing to sue under §4 of the Clayton Act for price fixing violative of §1 of the Sherman Act, for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and for breach of fiduciary duty arising under state law?

III.

Whether the Court of Appeals for the Sixth Circuit properly rejected the "passing on" defense asserted by Petitioners when, under state law, any recovery obtained by the Respondent Counties would likewise be "passed on" to those municipalities and end-users?

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No. 89-56 No. 89-79 No. 89-101

In The Supreme Court of the United States

October Term, 1989

NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.* (Petitioners in No. 89-56), THE CITY OF DETROIT (Petitioner in No. 89-79), AND COLEMAN A. YOUNG (Petitioner in No. 89-101),

Petitioners,

v.

THE COUNTY OF OAKLAND and THE COUNTY OF MACOMB,

Respondents.

THE COUNTY OF MACOMB'S BRIEF OPPOSING THE PETITIONS OF NANCY ALLEVATO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MICHAEL J. FERRANTINO, SR., *ET AL.*, THE CITY OF DETROIT, AND COLEMAN A. YOUNG FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, the County of Macomb, Michigan ("Macomb"), respectfully prays that this Court deny the petitions of Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., *et al.*, the City of Detroit, and Coleman A. Young, for a writ of certiorari. The United States Court of Appeals for the Sixth Circuit reversed the district court's dismissal of Macomb's complaint and remanded the case for further proceedings. There is no conflict between the Sixth and Seventh Circuit Courts of Appeal on the unique and specific issues presented and the Sixth Circuit's decision is in accord with settled jurisprudential principles. Moreover, the issues presented should not be reviewed by this Court at this time, in any event, because of the sparse substantive record and the present interlocutory posture of this case.

STATEMENT OF THE CASE

The Counties of Oakland ("Oakland") and Macomb ("Macomb"), Michigan, (the "Counties" or "Respondents") commenced this antitrust and RICO treble damages action in 1984.[1] The action followed criminal convictions of several of the Petitioners, in *United States* v *Bowers*, 828 F.2d 1169 (1985). The Counties alleged that Petitioners participated in a scheme and pattern of illegal price-fixing and monopolizing regarding certain contracts for the disposal of sludge treated by the Detroit Water and Sewerage Department (the "DWSD"). Pursuant to state statute, Mich. Comp. Laws §46.173, the Counties had entered into contracts with the City of Detroit and the DWSD for sewerage services (the "Contracts"), and payments to Detroit under the Contracts included the alleged illegal overcharges for the disposal services.[2] Pursuant to those Contracts the Counties are the direct purchasers of the DWSD's sewerage services on behalf of themselves and the municipalities and residents within their political boundaries. Under those state statutes, the Counties do not derive a profit under the Contracts. Rather, they are to collect their costs, including payment to Detroit under the Contracts,

[1] The Counties' action is pursuant to §4 of the Clayton Act, 15 U.S.C. §15, and the similar provision in RICO, 18 U.S.C. §1964(c). This case also involves a state law claim for breach of fiduciary duty against Petitioner Coleman A. Young.

[2] Public Act 342 of 1939 authorized counties to establish and provide county sewage services. A county exercising such authority must designate a "county agency" to discharge that authority and to be responsible for the supervision and control of the management of such services. Mich. Comp. Laws §46.173. The counties are authorized to build and maintain all necessary facilities; determine rates, charges and assessments to be collected for such services; and to enter into and enforce contracts in connection with such services, including contracts with users for the provision of such services. Mich. Comp. Laws §§46.171 *et seq.*

from the municipalities, which, in turn, allocate the costs to their residents. Mich. Comp. Laws §46.175.[3]

Macomb joined this action to recover damages for the illegally increased costs of sewerage services. Under state law, any recovery will inure to the benefit of the municipalities, and, ultimately, the residents of Macomb. The county agency that is responsible for managing the county sewage system must establish "just, equitable, and uniform rates, charges or assessments" and "the amounts fixed for rates, charges, or assessments" must only include the "complete and actual cost" of the sewage system. Mich. Comp. Laws §46.174.

Prior to filing answers, and prior to the conduct of any discovery, Petitioners moved to dismiss the complaints on numerous independent dispositive bases pursuant to Fed. R. Civ. P. 12(b)(6). The district court dismissed the complaints on the ground that the Counties lacked standing to sue.[4] 620 F. Supp. 1399. The Counties filed a motion to alter judgment, attaching an affidavit of the Oakland Chief Deputy

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[3] Each local governmental unit within a county system pays the county for sewage services out of funds it collects from users of the services. The funds collected by the counties are maintained by the counties in separate enterprise funds and may be used only for the purposes authorized by statute.

[4] Petitioners asserted numerous other grounds for dismissal. For example, the City of Detroit argued that the Counties' action was barred by the Local Government Antitrust Act of 1984, 15 U.S.C. §§34 *et seq.*; that the Counties had failed to plead a RICO claim because the entities and persons described in the complaint were not "separate"; and that the Counties had not sustained any damages. Petitioner Young, joined by Petitioner Allevato, asserted that the activities complained of were exempt state action; that the Counties' action was barred by judicial and executive governmental immunity; that the Counties' complaints failed to state an antitrust claim because no antitrust injury, in addition to injury in fact, had been pled and no injury to competition had been pled; and that the Noerr-Pennington doctrine provides an exception to the antitrust activity alleged in the complaints as a matter of law.

Drain Commissioner which clarified the contractual and political relationships between the DWSD, the Counties, the municipalities and their residents, the end users of the sewerage system. The court denied the motion, 628 F. Supp. 610, and the Counties appealed from the court's orders granting the motion to dismiss and denying the motion to alter that order.

On January 27, 1989, the Court of Appeals for the Sixth Circuit reversed the decision of the district court and reinstated the complaints. 866 F.2d 839. Nancy Allevato, as Personal Representative of the Estate of Michael J. Ferrantino, Sr., *et al.*, the City of Detroit, and Coleman A. Young then filed the instant Petitions for a Writ of Certiorari (the petitions of "Allevato", "Detroit", and "Young", respectively).

REASONS FOR DENYING THE PETITION

There has been no answer, discovery or trial in this case. The record includes only the Counties' complaints, an affidavit of Oakland's deputy drain commissioner, the Petitioners' motions to dismiss the complaints and supporting briefs and the Counties' briefs opposing dismissal. As noted above, other grounds for dismissal were asserted by Petitioners, which the district court has never addressed. In its present interlocutory posture the issues in this case do not warrant this Court's review at this time.

The Sixth Circuit's decision correctly applied this Court's decision in *Hanover Shoe, Inc.* v *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Contrary to the arguments in the petitions of Allevato and Young, the Sixth Circuit's decision does not conflict with the *en banc* decision of the Seventh Circuit in *State of Illinois ex rel. Harrington* v *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 109 S.Ct. 543 (1988), nor is it inconsistent with this Court's decision in *Illinois Brick Co.*, v *State of Illinois*, 431 U.S. 720 (1977), or any of the decisions in other circuits applying *Illinois Brick*. The factual circumstances of this case,

including its public sector aspects, make this case unique and render application of the sound jurisprudential principles of *Hanover Shoe* and *Illinois Brick* relatively simple. Because this case presents the "perfect pass on" regarding both the illegal overcharges and the allocation of any recovery of damages for the overcharges, none of the complex economic and jurisprudential policy considerations presented in those cases are even implicated. In short, the difficult issue decided in *Hanover Shoe* — whether to allow a direct purchaser to recover a windfall rather than allowing antitrust violaters to escape liability — is simply not involved. Nor is there any risk that Petitioners will be exposed to multiple liability. The Sixth Circuit's decision serves all of the policies addressed in *Hanover Shoe* and in *Illinois Brick*.

THE SIXTH CIRCUIT CORRECTLY HELD THAT THE CIRCUMSTANCES OF THIS CASE DO NOT WARRANT CREATING AN EXCEPTION TO THE RULE IN *HANOVER SHOE*.

In *Hanover Shoe*, *supra*, this Court rejected as a matter of law the defensive use of the pass-on theory by an antitrust defendant against a direct purchaser who had sued for treble damages under §4 of the Clayton Act. The Court held that a direct purchaser is injured within the meaning of §4 by the full amount of the overcharge paid by it and that an antitrust defendant is not permitted to introduce evidence that the plaintiff had passed on the illegal overcharge to others farther along in the chain of distribution. 392 U.S. at 494. The Court followed long standing precedent that the "victim of an overcharge is damaged within the meaning of §4 to the extent of that overcharge." 392 U.S. at 491 (citing *Southern Pacific Co.* v *Darnell-Taenyer Lumber Co.*, 245 U.S. 531 (1918)).

The *Hanover Shoe* Court rejected the pass on defense notwithstanding "the argument that sound laws of economics require" that it be recognized. 392 U.S. at 492. The Court reasoned that accepting the defense would complicate treble-damage actions because of the economic uncertainties and complexities of quantifying the effects of the overcharge on the purchaser's prices, sales, costs, and profits. 392 U.S. at 492–493. Another equally important reason for the Court's rejection of the defense was its unwillingness to risk the chance that antitrust violators would "retain the fruits of their illegality" because indirect purchasers might "have only a tiny stake in the lawsuit" and much less incentive to sue than a direct purchaser. 392 U.S. at 494. The Court concluded that rejecting the pass-on defense was consistent with the Congressional intent of promoting the effective enforcement of the antitrust laws. 392 U.S. at 492–494. The Court reasoned:

> "[I]f buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness." 392 U.S. at 494.

The prospect of allowing the defensive use of the pass-on theory, either as a complete bar to a direct purchaser's action or as a limitation on the measure of damages, involved, among other things, the following competing policy considerations: (a) whether to allow an antitrust plaintiff who had "passed-on" all or some of an illegal overcharge to obtain a windfall —the entire amount of the overcharge or (b) whether to allow a

decrease in the effective enforcement of the antitrust laws by allowing violators to retain a portion of the illegal overcharges. As explained in *Illinois Brick Co.* v *Illinois*, *supra*, 431 U.S. at 752 (Brennan, J., dissenting):

> "*Hanover Shoe* thus confronted the Court with the choice, as had been true in *Darnell-Taenzer*, of interpreting §4 in a way that might overcompensate the plaintiff, who had certainly suffered some injury, or of defining it in a way that under-deters the violator by allowing him to retain a portion of his ill-gotten overcharges. The Court chose to interpret §4 so as to allow the plaintiff to recover for the entire overcharge. This choice was consistent with recognition of the importance of the treble damages action in deterring antitrust violations." *Id.*

Illinois Brick presented the related issue whether indirect purchasers could offensively assert the pass-on theory to recover damages pursuant to §4 for the portion of illegal overcharges passed on to them. This Court, by a six-to-three vote, held that only overcharged direct purchasers were "injured" within the meaning of §4. The Court declined to allow the offensive use of the pass-on theory for two reasons: to avoid the "serious risk of multiple liability for defendants," 431 U.S. at 732, and to avoid the "costs to the judicial system and the efficient enforcement of the antitrust laws" that would result from the complexities and uncertainties of analyzing "price and out-put decisions 'in the real economic world rather than an economist's hypothetical world.'" 431 U.S. at 732 (quoting *Hanover Shoe*, *supra*, 392 U.S. at 493).

The Illinois Brick Court confronted the choice of allowing the risk of multiple liability or denying recovery to indirect purchasers who had absorbed illegal overcharges "passed on" from innocent direct purchasers. The majority resolved, consistent with *Hanover Shoe*, to allow direct purchasers to

recover the full amount of the overcharge and to deny recovery to indirect purchasers. The majority reasoned:

"We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e.g.*, *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968), supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of '"private attorneys general"' to enforce the antitrust laws under §4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S., at 262, 92 S.Ct., at 891, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

"It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations. Of course, as Mr. Justice BRENNAN points out in dissent, 'from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation.' *Post*, at 2082. But §4 has another purpose in addition to deterring violators * * *; it is also designed to compensate victims of antitrust violations for their injuries. * * * In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all 'those within the defendant's chain of distribution,' *post*, at 2082, especially

because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues." 431 U.S. at 746. (Footnotes and citations omitted.)

In *dicta*, the Court mentioned two possible narrow exceptions to the rule in *Hanover Shoe*, as recently noted by this Court in *California* v *ARC America Corp.*, 490 U.S. ____, 109 S.Ct. 1661, 1663, n2 (1989):

> "When the direct purchaser and the indirect purchaser have entered into pre-existing cost-plus contracts, *Illinois Brick Co.* v. *Illinois*, 431 U.S., at 732, n. 12, 97 S.Ct., at 2067, n. 12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.*, at 736, n. 16, 99 S.Ct., at 2070, n. 16."

Those possible narrow exceptions must be viewed in the light of the competing policy considerations underlying the rule in *Hanover Shoe*. The policies discussed in *Illinois Brick* and *Hanover Shoe* are these: *First*, that violators should not escape liability under the antitrust laws and those laws should be efficiently enforced; *Second*, that the antitrust laws should be construed to further the policies of deterrence and compensation; *Third*, that violators should not be exposed to multiple liability; and *Fourth*, that direct purchasers who have suffered no true injury should not be unjustly enriched by a windfall judgment. The Sixth Circuit's decision in this case serves all of those policies.

Petitioners acknowledge that Oakland and Macomb Counties are not like middleman merchants. That is, the Counties' Contracts with Detroit have been made pursuant to Michigan statutes which authorize the Counties to provide sewage services to their inhabitants and require that they do so at cost. As the petition of Allevato says: "[t]his case presents a perfect pass on * * *." Allevato petition at 13.

By law, the Counties' sewage operations must be nonprofit; the counties must charge sufficient amounts to their

constituent communities to recover the costs the Counties incur and they may not charge more. This means that, if the Counties recover, they will not garner a windfall, for they must pass on the recovery, as they passed on overcharges.[5] As Allevato's petition states, the Counties "could not retain the fruits of victory." Allevato Petition at 17. The Sixth Circuit made note of that legal obligation:

> "As we understand it, however, the funds are non-profit, so any recovery would ultimately have to be passed through to the end-users via charges lower than those that would otherwise be imposed." 886 F.2d at 850, n. 6.

The Counties operate sewage funds under state laws which make it clear that the Counties are not merchants engaging in trade. Rather, they are fulfilling a public health function with state-granted power to make and enforce contracts. This distinguishes the Counties from cost-plus middlemen, who operate for the purpose of making profits and avoiding losses. When an innocent middleman purchases from an antitrust violator, he is entitled to claim damages. However, if that middleman has passed his "injury" along to end purchasers, pursuant to cost-plus contracts, a fundamental problem in the administration of justice arises. If the middleman is allowed to recover the entire overcharge from the violator, he will receive a windfall which he will be able to pocket, because no theory of law permits the end purchasers to sue him. The middleman is innocent and the mere fact that he has recovered damages from a violator does not give end

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[5] The municipalities are entitled to demand faithful compliance with those state statutes. They do have the right to enforce the statutes and to seek judicial review of the rates the Counties set, which must be reasonable and must be based upon cost recovery. If the Counties obtain any recovery in this case, it will go into the sewer funds they administer for the purposes authorized by law — provision of sewer treatment services. *See* Mich. Comp. Laws §§46.171 *et seq*; Mich. Comp. Laws §§123.731 *et seq*.

purchasers a cause of action against him, at least not under the federal antitrust laws.

That is the problem that may warrant an exception to the rule in *Hanover Shoe*, if the difficulties of economic tracing can be overcome. That problem does not exist here, for the reasons so ably stated by Petitioners. Here, because of the unique statutory relationships among the Counties and their constituent communities and, in turn, between the communities and the end users, any recovery by the Counties must and will accrue to the benefit of the end purchasers. That is to say, if damages are awarded to the Counties, Michigan law requires that they be treated as sewage fund assets. At that point, they either can be refunded to the constituent communities or applied to defray sewage expenses being incurred by the Counties, with consequent reductions of the bills to the communities and, in turn, to the end users. The economic benefit of the recovery is thus apportioned to those who were injured by the illegal acts.

By virtue of state law, the "perfect pass on" truly has been created. Illegal overcharges have indeed been passed on by the Counties and, as a matter of law, it is inevitable that an award redressing the illegal overcharges also will be passed on by the Counties to the communities which suffered the wrongful burden. Thus, every element of justice considered by this Court in *Hanover Shoe* and *Illinois Brick* is satisfied. No duplicate recovery can occur because the Counties' recovery, if any, will inure to the benefit of those who have borne the ultimate costs. Nor will a violator escape liability. Efficient administration of justice will occur because this "perfect" pass on is a statutory two-way street.

Denying standing to the Counties in this case would frustrate the effective enforcement of the antitrust laws and would defeat the settled jurisprudential policies addressed in *Hanover Shoe* and *Illinois Brick*. Extended to its logical conclusion, Petitioners' pass-on defense would require that only the end-user residents would have standing to sue. The economic complexities of apportioning the illegal overcharges

at that level, and the relatively small stake in the litigation that each resident may have, would surely frustrate the effective enforcement of the antitrust laws and would allow Petitioners to retain some portion of the "ill-gotten overcharges." *Illinois Brick*, *supra*, 431 U.S. at 752 (Brennan, J., dissenting). In this case, the Sixth Circuit correctly held that, because all of the policies underlying the antitrust laws — including the deterrence and compensation policies — will be well served, the circumstances do not warrant creating an exception to the rule in *Hanover Shoe*.

CONCLUSION

For all of the above reasons, the Petitions of Allevato, Detroit and Young should be denied.

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August 11, 1989

(3) (3)

Nos. 89-56 and 89-101

In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, as Personal Representative of the ESTATE OF MICHAEL J. FERRANTINO, SR., *et al.*,

Petitioners,

v.

THE COUNTY OF OAKLAND AND THE COUNTY OF MACOMB,

Respondents.

COLEMAN A. YOUNG,

Petitioner,

v.

THE COUNTY OF OAKLAND AND THE COUNTY OF MACOMB,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT OAKLAND COUNTY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether counties that directly purchase sewage treatment services at illegally inflated prices lose their standing to sue under the antitrust laws and this Court's decision in *Hanover Shoe* when the money used to pay for the services is generated by fees that are ultimately collected from users of the counties' sewer systems.

2. Whether counties that directly purchase sewage treatment services at illegally inflated prices lose their standing to sue under the Racketeering Influenced and Corrupt Organizations Act when the money used to pay for the services is generated by fees that are ultimately collected from users of the counties' sewer systems.

LIST OF PARTIES AND RULE 28.1 LISTING

The plaintiffs-appellants in the proceedings before the United States Court of Appeals for the Sixth Circuit were the County of Oakland and Macomb County; both are Michigan counties contiguous to the City of Detroit. Both counties are named as respondents to the Petitions addressed herein.

The defendant-appellees in the proceedings before the United States Court of Appeals for the Sixth Circuit were the City of Detroit, Detroit Mayor Coleman A. Young, Nancy Allevato (as Personal Representative of the Estate of Michael J. Ferrantino, Sr.), Sam Cusenza, Joseph Valentini, Charles Carson, Walter Tomyn, Michigan Disposal, Inc., Wayne Disposal, Inc., Wolverine Disposal, Inc., and Wolverine Disposal-Detroit, Inc. Two other defendants, Charles Beckham and Darralyn Bowers, were parties to the proceedings before the District Court but did not participate on appeal.

The present respondent, the County of Oakland, is a governmental entity that has no parent companies, subsidiaries, or affiliates as defined in Rule 28.1.

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Nos. 89-56 and 89-101

In the Supreme Court of the United States

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THE COUNTY OF OAKLAND AND THE COUNTY OF MACOMB,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT OAKLAND COUNTY IN OPPOSITION

Oakland County ("Oakland" or "the county") hereby opposes the Petitions for Writ of Certiorari filed by Nancy Allevato et al. on July 13, 1989 ("Allevato Petition") and by Coleman A. Young on July 17, 1989 ("Young Petition") in the above-captioned actions. For the reasons set forth below, respondent respectfully requests that the Court deny both Petitions.[1]

[1]In addition, only 10 days before this Brief in Opposition was due to be filed, Oakland learned that the City of Detroit had filed a third Petition, No. 89-79, in this matter which had never been served upon any of the counsel representing Oakland. Not until August 8, 1989—the day before this Brief was due to be typeset—was that Petition served upon any of respondent's counsel and even then upon only one of the several counsel appearing for respondents below. Detroit's disregard of this Court's service rules has greatly prejudiced respondents.

Hence, Oakland has requested, by separately filed Memorandum, that this Court dismiss or deny the City's Petition for failure to comply with the rules. In any event, the City's Petition, like the other two Petitions, lacks merit for the reasons that follow.

COUNTERSTATEMENT OF THE CASE

This is a civil action to recover treble damages under the federal antitrust and RICO laws from the convicted criminal defendants, general related corporations, the City of Detroit, and the Mayor of Detroit, due to alleged overcharges for sewage disposal services. The plaintiffs are two Michigan counties that paid inflated charges for sewage disposal services because of an alleged price-fixing conspiracy and kickback scheme commonly known as the "Vista" conspiracy. This conspiracy has been the subject of considerable litigation; indeed, many of the current petitioner/defendants pleaded guilty or were convicted of participating in the very scheme that is the subject of this civil action.

In the instant case, the district court dismissed the complaints on the ground that the counties, notwithstanding their status as direct purchasers of the tainted services, lacked standing to sue pursuant to the Supreme Court's decisions in *Hanover Shoe. Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The United States Court of Appeals for the Sixth Circuit reversed,[2] finding that the plaintiff counties alleged sufficient injury to sue. The facts set forth below clearly demonstrate that the Sixth Circuit's decision was correct and that this Court's jurisdiction should not be invoked further to delay and obstruct plaintiffs' right to relief.

I. The 1977 EPA Proceedings

In 1977, as is still the case, the City of Detroit operated a large waste water treatment plant that treated all sewage generated within the City of Detroit, as well as most of the sewage generated within outlying counties and municipalities. The plaintiff counties

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[2]For this Court's convenience, Oakland will cite to the version of the Sixth Circuit decision set forth in Appendix A to the Allevato Petition, using the following citation form: "Decision at __ a."

purchased sewage treatment services from Detroit pursuant to contracts with the City.

In 1977, the United States sued Detroit in federal district court, alleging that Detroit was disposing of sewage in violation of the federal environmental laws. Eventually, the parties entered into a consent judgment. The United States, however, became dissatisfied with the pace at which Detroit moved toward compliance; consequently, in March 1979, the district court designated Detroit Mayor Coleman A. Young as "administrator" of the wastewater treatment plant, charging the Mayor with responsibility for bringing the City into compliance with the consent decree. Invoking its "broad range of equitable powers . . . to enforce and effectuate its . . . judgments," the court removed all functions relating to operation of the Detroit sewage treatment plant from the City's Board of Water Commissioners and City Common Council and instead concentrated all power in the Mayor. The court granted the Mayor "extraordinary" powers, including the power to waive competitive bidding requirements in awarding contracts and the power to operate "without the necessity of any actions on the part of the Common Council of the City of Detroit . . . " *United States v. City of Detroit*, 476 F. Supp. 512, 515, 520-521 (E.D. Mich. 1979). It is the manner in which the Mayor and his associates then chose to exercise these powers that is the subject of this action.

II. The "Vista" Conspiracy

On May 1, 1979, Detroit, through Mayor Young, signed a sludge disposal contract with defendant Michigan Disposal, Inc., a sludge hauling firm owned by the late Michael J. Ferrantino.[3] This contract covered a portion of the output of the Detroit wastewater treatment plant. The contract called for all sludge

[3]On February 3, 1983, the United States indicted Ferrantino for RICO violations (18 U.S.C. § 1362(c) & (d)) and mail fraud (18 U.S.C. § 1341). He was convicted on one RICO count in December 1983, but died in January 1984 before sentencing. His Estate is a defendant in this action and a petitioner in this Court through Nancy Allevato, the Estate's personal representative.

handled pursuant to the Michigan Disposal contract to be transported to a landfill owned by Wayne Disposal, Inc., another firm controlled by Ferrantino.

In 1980, Michigan Disposal made an unsolicited proposal for a second sludge hauling contract that would cover the balance of the output of Detroit's plant. The City initially rejected this proposal on the grounds that total dependence on a single sludge hauler would be bad policy. As the Sixth Circuit found below, Ferrantino then entered into a conspiracy with Darralyn Bowers, a close friend of Mayor Young's, to create a "front" company that would surreptitiously obtain the second contract. In conjunction with Walter Tomyn, Sam Cusenza, and Joseph Valentini, who were all employees of Ferrantino-controlled companies, Bowers and Ferrantino fabricated a company known as "Vista Disposal." Vista was held out as the sole proprietorship of one Jerry Owens, a man with no previous experience in the hauling and disposal industry. Vista then submitted a proposal that included false statements about Vista's ownership, Owens' experience, and other material facts. Vista's attorney, Charles Carson, and the director of the Detroit wastewater treatment plant, Charles Beckham, also participated in the plot to create Vista and the subsequent efforts to secure the city contract for Vista. Eventually, in response to City Council attempts to scrutinize the proposed award, the Mayor summarily used his court-conferred powers to award the contract to Vista without competitive bidding and without the City Council's approval.[4]

In 1980, the Federal Bureau of Investigation obtained information about the Vista scheme and began a massive investigation that included extensive court-ordered electronic surveillance. The FBI investigation led to the prosecution of each of the current

[4]The "Vista" conspiracy was endlessly more complex than can be detailed for purposes of this Brief. The history of the conspiracy is set forth in *United States v. Bowers*, 828 F.2d 1169, 1170-73 (6th Cir. 1987), *cert. denied*, __U.S.__, 108 S.Ct. 1731 (1988), the decision affirming Bowers' and Beckham's convictions.

defendants—except certain related corporations, the City, and the Mayor—all of whom either pleaded guilty or were convicted under the Racketeering Influenced and Corrupt Organizations Act (RICO) or the federal mail fraud statute.[5]

III. The Sewage Disposal Systems Of Oakland and Macomb Counties

As noted above, the Detroit sewage system serves not only the incorporated city but also the outlying counties, including the current plaintiffs, the Counties of Oakland and Macomb. At the time the Vista conspiracy occurred, these counties had contracts with Detroit for the disposal of sewage generated within the counties. Complaint at ¶ 19 (attached as Appendix A to this Brief in Opposition). Those contracts provide that the counties' sewage will be transported to Detroit for treatment and eventual disposal at Detroit's wastewater treatment facility. Complaint at ¶ 5.[6] To facilitate disposal, Oakland has constructed and currently operates its own sewer system interceptors connecting municipal sewers with Detroit's interceptors. Affid. at ¶ 8. To provide these and related services, the county maintains a staff of approximately 150 persons. Affid. at ¶ 8.

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[5]Beckham, Bowers, Ferrantino, Cusenza, Valentini, and Carson were indicted in 1983 on various counts of RICO violations, conspiracy, mail fraud and, in Beckham's case, violation of the Hobbs Act. Bowers, Cusenza, and Ferrantino were each convicted in December 1983 of one count of RICO conspiracy; the court declared a mistrial as to all other defendants and all undecided counts. Ferrantino then died before sentencing or retrial. *See* note 3 *supra*.

Bowers, Beckham, Valentini, Carson, and Cusenza were again indicted on February 3, 1984; Cusenza, Valentini, and Carson then pleaded guilty to various counts, and Bowers and Beckham were retried and convicted on all counts. The history of the Bowers and Beckham criminal actions is set forth in *United States v. Bowers*, 828 F.2d at 1170-73.

[6]After the district court's initial ruling dismissing the Complaint, the counties filed a Petition for Reconsideration that included the Affidavit executed by Robert H. Fredericks II, the Chief Deputy Drain

(Footnote continued on following page)

Detroit charges Oakland for providing disposal services and is paid by Oakland whether the municipalities pay the county on time or in full. Affid. at ¶ 16(b). Oakland pays for the services and, in turn, charges its municipal and individual customers. Oakland therefore constitutes the direct purchaser of the tainted services. Affid. at ¶¶ 16(a), 16(b), 24; Complaint at ¶ 20.

Oakland, through its sewer districts, unilaterally sets the municipal rates, charging the municipalities for (a) costs incurred by the county under its contractual arrangements with Detroit, (b) costs incurred in operating and maintaining the county system, and (c) an allowance for reserves. Affid. at ¶ 16(a)(v). The computation of a particular municipality's bill is complex because the character of the information used in the allocation process varies widely from community to community. In some areas within Oakland County, for instance, there are no individual user meters or master meters to accurately record the flow of sewage. In the Clinton-Oakland sewer district, the allocation is based on estimated usage multiplied by a flat rate and adjusted by "a unit assignment factor." In the Evergreen-Farmington district, however, Oakland bills its municipalities based on meter readings where available and otherwise on assumed meter readings, applying a multiplication factor to the average metered readings. Affid. at ¶ 16(a)(ii). Oakland also charges some municipalities in the Evergreen-Farmington District a storm water fee that is added to the sewer bill. *Id.* Ratemaking complexity is compounded by the fact that several municipalities are located in two different sewer districts and therefore receive two different bills. Affid. at

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(Footnote continued from previous page)
Commissioner for Oakland County. The Fredericks Affidavit details the manner in which Oakland administers its sewage disposal system and pays its bills to Detroit. The Fredericks Affidavit also discusses the manner in which the various municipalities bill their end users and remit the sums due to the county. Finally, the Fredericks Affidavit discusses the various injuries inflicted by Detroit upon the county through imposition of the illegal overcharges. It is attached as Appendix B to this Brief and hereinafter cited as "Affid. at ¶ __."

¶ 16(a)(iv).[7] In addition to operating connecting sewers that link local municipal systems with the Detroit system, Oakland is also directly responsible for operating the local sewer systems in three incorporated cities and one village. Affid. at ¶ 17.

To fund its sewage disposal system, Oakland has issued bonds in its name for the construction of interceptor sewers and the lateral sewer systems connecting Oakland's own sewer interceptors to those of the various municipalities. Affid. at ¶¶ 9, 10. Oakland pledged its full faith and credit for those bonds. *Id.*

To administer its sewage system and pay its bills to Detroit, Oakland maintains in its own name a separate, segregated account ("enterprise funds") for each of the three sewer districts within its borders. Affid. at ¶ 16(b). All sewage fees collected from the municipalities are placed in the appropriate enterprise fund. *Id.* Oakland then pays Detroit's sewage treatment bills from these separate funds without regard to whether individual municipalities have paid their bills in full or on time. *Id.*

The municipalities connected to Oakland's interceptor sewers pay their sewage fees to the county and bill their individual residential and commercial customers pursuant to a procedure similar to that of the county; that is, the municipalities pay the county from their own segregated sewage funds, which consist of money collected from end users of the sewage system. Affid. at ¶ 23(c). The municipalities set the rates for system users within their jurisdiction; in doing so, they use the rate charged by the counties as a base rate and add to that their costs of maintaining the municipal sewage system. Affid. at ¶ 23(b).

Oakland has a responsibility to its constituent municipalities to obtain the lowest possible price for sewage disposal from Detroit. Affid. at ¶ 13. Consequently, it monitors Detroit's ratemaking deliberations and, since 1975, has challenged every major rate

[7]The billing process of Macomb County differs slightly. See Decision at 6a n.2.

increase by Detroit. Affid. at ¶ 14. Moreover, Oakland has greater resources and greater ratemaking expertise than the municipalities or end users. Affid. at ¶¶ 19, 26.

IV. The Counties' Civil Action

Oakland County filed the instant action in 1984, following the first wave of criminal prosecutions in the Vista conspiracy. Macomb soon intervened as an additional party plaintiff.[8]

The Complaints alleged that the defendants had, by means of the Vista conspiracy, conspired to violate the antitrust and racketeering laws by excluding competition, illegally fixing the price of sludge hauling, monopolizing the sludge hauling industry, and imposing illegal overcharges. Complaint at ¶¶ 44, 48, 52, 63–65, 68, 75, 81–82, 85. The effect of the conspiracy was to inflate the costs of sewage treatment drastically above the amount that would have resulted from a free and competitive bidding process. *Id.* at ¶¶ 49, 53, 66, 69, 76, 83, 86.

The Oakland Complaint alleged, and the Court of Appeals found, that the plaintiff counties were the direct purchasers of the disputed services. The Complaint specifically alleged injury to the counties resulting from the illegal acts charged:

> Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of [Detroit Wastewater Treatment Plant] sludge caused by Defendants' unlawful conduct.

Complaint at ¶ 49. Defendants' unlawful inflation of sewage prices resulted in the dissipation of the counties' enterprise funds.

Without answering the Complaint, defendants moved for dismissal pursuant to Rule 12(b) on a variety of grounds, including

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[8]Macomb's Complaint essentially incorporated by reference the allegations of Oakland's Complaint. All references herein are to Oakland's Complaint.

the assertion that plaintiffs lacked standing because they "passed on" the alleged injury to end users. The district court granted the motion, finding that plaintiffs lacked standing, and denied subsequent motions to alter judgment. The court found, in essence, that the counties, while literally the "direct purchasers" of the tainted services, were "mere conduits" that pass through their entire injury to the indirect purchasers of the services.[9] The district court thus held that defendants had met requirements of the "pass-on" exception mentioned in this Court's *Illinois Brick* and *Hanover Shoe* decisions.

V. The Court of Appeals' Decision

The United States Court of Appeals for the Sixth Circuit subsequently reversed the District Court's decision on all grounds relevant to these Petitions, finding that the counties did indeed have standing under Article III of the Constitution, as well as under the antitrust and RICO laws.[10]

First, the Court of Appeals recognized that the counties are the direct purchasers of the services at issue, notwithstanding that, in the context of ratemaking, they have been described as "mere conduits" for sewage charges owed to the City of Detroit. *See* Decision at 10a-11a. As the court noted, even defendants concede that the counties are the parties who entered into the contracts at issue and paid the bills to Detroit; hence, for purposes of determining antitrust and RICO standing, "the counties certainly are buyers." Decision at 11a.

The Court of Appeals then held that, as direct purchasers of tainted goods, the counties clearly suffered "injury in fact," and thus satisfied Article III standing requirements. The Court of

[9]*See* District Court decision granting defendants' motion for summary judgment, Allevato Petition at 32a-35a; District Court decision denying motion to alter judgment, Allevato Petition at 41a-46a.

[10]Also at issue in the appeal were certain ancillary discovery issues and an issue regarding the Mayor's fiduciary duty. Those issues are not raised in the instant Petitions.

Appeals observed that this Court's recent decision in ***Bacchus Imports, Ltd. v. Dias***, 468 U.S. 263 (1984), decisively rejected the argument that a direct purchaser loses its constitutional standing merely by virtue of its ability to pass through a portion or all of the charge. Decision at 14a.

Finally, the Court of Appeals analyzed the facts and the applicable Supreme Court precedent and concluded that the plaintiff counties also had antitrust and RICO standing under *Illinois Brick* and *Hanover Shoe*. The court found that this case could not be forced into the "cost-plus" exception of *Hanover Shoe* because the contract at issue is not for a "fixed quantity" and, furthermore, because government entities are recognized to suffer injury irrespective of their ability to pass on some or all of the amount of the overcharge. Moreover, the Court of Appeals found that, pursuant to this Court's decision in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the counties were clearly the best parties to be plaintiffs in this case, and only suit by the counties could prevent any action lodged against these defendants from degenerating into the massive evidentiary inquiry that this Court sought to avoid with its pronouncements in *Illinois Brick* and *Hanover Shoe*. The Court of Appeals also held that the same factors established the counties' standing under RICO. After denial of their Petitions for Rehearing, defendants filed the instant Petitions.

REASONS FOR DENYING THE WRIT

Summary of Argument

In their Petitions, defendants doggedly pursue the same strategy that they have adopted throughout this litigation; they proclaim their entitlement to a "pass-on" defense, completely ignoring this Court's decisions in *Hanover Shoe* and *Illinois Brick*. Now, however, they have added the predictable contention that there is a "split in the circuits" and a "risk of double recovery" that necessitate this Court's intervention.

The United States Court of Appeals for the Sixth Circuit wisely rejected all such contentions. *Hanover Shoe* and *Illinois Brick* clearly prohibit these defendants from using the pass-on defense to stave off this civil action. Indeed, *Hanover Shoe* and *Illinois Brick* enunciated a clear, firm rule that would prevent exactly the kind of excessive, complex inquiries regarding pass-on questions that have characterized defendants' litigation strategy thus far. The Petitions should be denied because there is no split in the circuits or other need for this Court's intervention and because the decision below was correct.

I. The Decision Below Correctly Held That *Hanover Shoe* And *Illinois Brick* Accord Antitrust Standing To The Plaintiffs As Direct Purchasers Of Tainted Services.

A. The Counties Have Standing Pursuant To Article III Of The United States Constitution.

The "threshold question" is whether the plaintiff counties have constitutional standing; the decision below correctly held that the counties met the injury requirements of Article III of the Constitution. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (existence of case or controversy is "the threshold question in every federal case"). Indeed, under *Hanover Shoe* and *Illinois Brick*, there should be no question but that a direct purchaser of tainted services has constitutional standing to sue, quite apart from the issue whether a pass-on defense may be lodged in a particular instance.

To satisfy Article III, a complaint "'must describe some actual or threatened injury to the complainant, must allege a causal connection between that injury and the defendant's putatively illegal conduct, and must advance some legally cognizable claim for redress.'" Decision at 11a (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). It has long been recognized that a direct purchaser of tainted goods or services suffers just such "actual injury." *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906). Significantly, the Court added

in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918), that the injury does not vanish merely because the plaintiff is able to recoup the illegal overcharge by passing it on to his own customers. *See also Adams v. Mills* , 286 U.S. 397, 407 (1932).

Moreover, this Court has recently reaffirmed these holdings in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Answering a contention that plaintiff liquor wholesalers lacked constitutional standing to challenge the imposition of a liquor tax, the Court in *Dias* found that the wholesalers "plainly" had standing. *Id.* at 267. First, the wholesalers were liable for the tax, regardless of whether they were in the position to pass it on; second, there was no reason to presume that imposition of the tax did not affect the wholesalers' business. *Id.* at 267. Here, too, the counties were clearly liable for sewage charges under the existing contracts, regardless of whether they could recoup any or all of those charges from municipalities or end users. Consequently, there is no reason to assume that the counties were uninjured by the overcharges. Decision at 15a.

In short, a direct purchaser of tainted services suffers "actual injury" under Article III. The defendants' contrary contention only begs the separate question whether they have a valid pass-on defense in the circumstances of this case.

B. The Sixth Circuit Correctly Interpreted *Hanover Shoe* And *Illinois Brick* To Permit Only The Narrowest Of "Possible" Exceptions To The Rule Against Pass-On Theories.

Having correctly disposed of the threshold issue of constitutional standing, the Sixth Circuit then addressed the primary issue raised by defendants below: whether the counties are the proper plaintiffs under this Court's rulings in *Hanover Shoe* and *Illinois Brick*. Once again, the Sixth Circuit properly found that *Hanover Shoe* and *Illinois Brick* lay down a firm rule that a direct purchaser has standing to sue under the antitrust laws and permit

only the narrowest of "possible" exceptions, none of which is present in this case.

The holding in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. at 481, was this Court's first, and still-definitive, ruling on the issue whether a direct purchaser of tainted goods who has the power to shift a portion of an alleged overcharge to indirect purchasers retains standing under the antitrust laws. There, Hanover Shoe, the direct lessee of shoe manufacturing machinery services, sued United Shoe, the lessor of the services. United Shoe attempted to defend on the ground that Hanover Shoe suffered no legally cognizable injury because it could pass on any overcharges to its customers, the end users of its shoes.

The Court disallowed the defense in no uncertain terms. As a matter of law, a buyer "has made out a prima facie case of injury and damage within the meaning of [the Clayton Act] . . . when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high. . . ." *Id.* at 489. This conclusion does not change even if the direct purchaser had the opportunity to recoup the overcharges in some other manner:

> It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. . . . We hold that the buyer is equally entitled to damages if he raised the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Id. (citations omitted).

United Shoe argued that the presumption against defensive use of a pass-on theory should be applied on a case-by-case basis and that "sound laws of economics require recognizing the defense" in differing situations. 392 U.S. at 491-92. The Court definitely rejected this argument, questioning the applicability of abstract economic models to real-world litigation problems:

> A wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact. . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

Id. at 492-93.

But, even in the rare case in which tracing injury would be feasible, the policies of the antitrust legislation would be undermined by the tracing process: "it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." 392 U.S. at 493. Enforcement of the antitrust laws would be unduly complicated by complex threshold inquiries into the issue of "pass-on," and the deterrent effect of the laws would be correspondingly blunted. *Id.*

The Court also identified a substantial policy favoring the designation of the direct purchaser as the injured party irrespective of the fact of a "pass-on": direct purchasers will, in all but the rarest instances, have suffered the greatest injury and thus have the most incentive to sue. "[U]ltimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws . . . would retain the fruits of their illegality . . ." *Id.* at 494. Thus, "[t]reble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness" if the ultimate consumers were deemed the proper plaintiffs. *Id.*

The decision in *Hanover Shoe* acknowledged only the possibility that an antitrust defendant might assert a standing defense to a direct purchaser's suit. The Court recognized that there "might be situations . . . where the considerations requiring that the

passing-on defense not be permitted in this case would not be present." *Id.* It noted as one such possible situation that in which a plaintiff passed on one-hundred percent of the overcharge to the indirect purchaser pursuant to a "pre-existing cost-plus" contract. *Id*. Otherwise, as a matter of antitrust policy, a direct purchaser of tainted goods is sufficiently injured even if he passes on or otherwise recoups the inflated prices he originally pays. *Id*. at 489-94.

In *Illinois Brick Co. v. Illinois* , 431 U.S. 720, 726 (1977), this Court confirmed that the decision in *Hanover Shoe* was not intended to encourage development of *ad hoc* exceptions to the rule against "pass-on" theories. In *Illinois Brick*, state and local government entities attempted to use the pass-on theory offensively (that is, to justify suit by the indirect purchasers of tainted goods). The Court rejected the attempt, confirming, in the process, its ruling in *Hanover Shoe*.

Initially, the Court in *Illinois Brick* rejected what was to be the first of many attempts to limit *Hanover Shoe* to certain types of overcharges. The Court noted that the "principal basis for *Hanover Shoe* . . . was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions 'in the real economic world rather than an economist's hypothetical model,'" as well as the "costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." 431 U.S. at 732-33. Hence, the Court "reject[ed] . . . attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets" because, even where arguably cost-plus contracts or fixed percentages operate, they are not "adhered to rigidly" in the real world. 431 U.S. at 744.

The Court also noted that *Hanover Shoe* "itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses." 431 U.S. at 745. Even the so-called "pre-existing cost-plus" exception was only cited as a possible situation where an

exception "might be permitted" because the combination of a cost-plus contract with a fixed quantity would arguably eliminate all of the problems that would accompany suits filed by indirect purchasers. 431 U.S. at 736-37, 746. Other than in such rare instances, the Court in *Illinois Brick* saw every reason to "adhere to the narrow scope of exemption indicated by our decision here." 431 U.S. at 745.[11]

Finally, the Court once again noted that it would be undesirable to permit proof of such exceptions. In the process, effective antitrust enforcement would be undermined:

> [T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same "massive evidence and complicated theories" into treble-damages proceedings . . . .

431 U.S. at 744-45.

Hence, the decision below correctly recognized that this Court has ruled as a matter of law against the assertion of the pass-on defense, given the predictable complexities inherent in litigating the issue and the likelihood that permitting such inquiries would deter antitrust enforcement. *See* Decision at 16a-19a. A direct purchaser has been declared the appropriate party to sue under the antitrust laws, and the "possible" exceptions to this rule have been deliberately narrowed in scope so as to discourage lower courts from developing exceptions on an *ad hoc* basis. The court below correctly applied a presumption in favor of the counties' standing that is mandated by *Hanover Shoe* and *Illinois Brick*.

[11]Hence, petitioners' repeated reliance on their creative "perfect pass-on" theory is misplaced; *Hanover Shoe* and *Illinois Brick* permit no such "perfect pass-on" exception. Petitioners have invented this theory simply because their arguments cannot conceivably fit into one of *Hanover Shoe* and *Illinois Brick's* articulated possible exceptions.

C. This Case Does Not Fall Within Any Exception, Nor Should An Exception Be Manufactured For Purposes Of This Case.

In light of this Court's controlling decisions, the Sixth Circuit's unwillingness to allow a pass-on defense in this case was completely proper and the district court's contrary view seriously mistaken. The Court of Appeals correctly recognized that, as direct purchasers, the plaintiff counties are the parties with standing to sue and that nothing justifies creating an exception to *Hanover Shoe* for purposes of this case.

It is evident that the counties adequately pled the existence of injury to bring themselves within the rule of *Hanover Shoe*. The counties specifically alleged that they were direct purchasers and that they were injured directly and proximately by defendants' wrongful acts. *See* Complaint at ¶¶ 19-20, 49. Consequently, apart from the supplemental facts eventually tendered in the Fredericks Affidavit, the complaint itself establishes Oakland's presumptive standing pursuant to the governing precedent.

In the face of the Complaint, petitioners have persisted in raising in the district court, and continue to raise, two fundamental contentions: first, that Oakland was not really the "direct purchaser" of sewage services and, second, that Oakland purchased sewage services pursuant to contracts that fall within the "pre-existing cost-plus" or some other exception to *Hanover Shoe*. The Sixth Circuit properly rejected both such arguments.

As a threshold matter, Oakland and Macomb constituted the "direct purchasers" of the sewage services at issue, and it is disingenuous to assert otherwise. By contract, the counties were obligated to purchase the services from Detroit and to pay for those services, even if they obtained no reimbursement for such services from their constituent municipalities or individuals.[12]

[12]As the Sixth Circuit noted in its decision, certain defendants contradicted this argument below by conceding that the counties are the parties obligated to pay Detroit and by attaching as exhibits the contracts demonstrating this very fact. Decision at 10a n.5.

In response, petitioners rely on one sentence—taken out of context—from the Sixth Circuit's decision in *County of Oakland v. City of Berkley*, 742 F.2d 289 (6th Cir. 1984). In that unrelated case, the Sixth Circuit held that the pendent jurisdiction doctrine permitted the federal court to decide a sewage charge dispute between Oakland County and a municipality; the court at one point described the county as a "mere conduit" and "an intermediary only, depending completely on payments from the municipalities to meet its obligation to Detroit." *Id.* at 292.

As the Sixth Circuit in the instant case noted, however, the *City of Berkley* opinion made clear that the county was the contracting party and the direct purchaser; indeed, "it was a dispute over the amount of the *County's* charges, after all, that was before us in that case." Decision at 10a-11a (citing *City of Berkley*, 742 F.2d at 291-92) (emphasis original).[13] Thus, nothing in the *City of Berkley* decision obviates the fact that the counties, rather than the municipalities or end users, are the direct purchasers of sewage services from Detroit.

Petitioners' second, principal contention is that the counties lack standing under the "pre-existing cost-plus" exception to *Hanover Shoe* or some other exception that should be recognized for purposes of this case. The Sixth Circuit disagreed, correctly recognizing that the counties are, indeed, injured parties and that nothing in this case permits application of the "cost-plus" exception or the development of a new exception.

First, the contracts at issue clearly do not fall within this Court's definition of the so-called "cost-plus" exception because they are not pre-existing cost-plus contracts for a fixed quantity. In *Illinois Brick*, this Court clarified its earlier reference to the "cost-plus" exception by noting that this exception would make

[13]The court below also noted that the dictum in the *City of Berkley* decision is inaccurate, given the evidence submitted in the present case establishing that the counties pay Detroit from the enterprise funds without regard to whether the municipalities have themselves paid in full or on time. Decision at 10a n.5; *see also* Affid. at ¶ 16(b).

sense only "because [the] customer is committed to buying a fixed quantity regardless of price," making the direct purchaser thus "insulated from any decrease in its sales as a result of attempting to pass on the overcharge . . . ." *Illinois Brick*, 431 U.S. at 736 (discussing *Hanover Shoe*, 392 U.S. at 481). Since then, most lower courts have adhered to the rule that the "cost-plus" exception may only be invoked where the contract at issue is a "pre-existing cost-plus" contract for a fixed quantity. *See, e.g., In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir.), *petition for cert. filed sub nom. Kansas v. The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979); *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977).

In the present case, the contracts and injuries at issue are not "fixed quantity" contracts. The counties do *not* commit to purchase or sell a certain amount of sewage services, and the demand remains elastic. By arguing that the "cost-plus" exception is flexible and should be interpreted not to require a "fixed quantity," petitioners themselves tacitly concede that the instant contracts do not fall within the literal and deliberately narrow scope of the "cost-plus" exception. Allevato Petition at 17-21.

Hedging their bets, petitioners also assert that the counties passed through all of their injury in an easily traceable fashion, hence requiring the development of a new exception to fit the facts of this case. Specifically, petitioners argue that the counties are by law "not-for-profit" entities so far as their sewage collection procedures are concerned; consequently, the manner in which they pass through their overcharges must be presumed to effect a "*perfect* pass-on" of all injuries that the counties suffer due to overcharges. Allevato Petition at 6, 9-12, 13 (emphasis original). The error here lies in equating "overcharges" with "injury." Although the counties operate as "not-for-profit" entities, they nevertheless suffer injury when forced to pay significant overcharges.

Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985), concerned the applicability of the *Hanover Shoe* rule to a governmental entity that was directly injured by a RICO violation.[14] In the *Carter* case, Cook County taxpayers sued an individual who allegedly bribed the County Board of Tax Appeals to obtain lower property tax assessments for his own clients; the taxpayers alleged that they were injured, albeit indirectly, because they were forced to pay higher taxes as a result of the lower assessments paid by the defendant's clients.

The Court of Appeals held that only the county—the directly injured party—had standing to sue. In so holding, the court rejected the argument that a wronged government entity will necessarily recoup all of its injury, thereby losing the right to sue under the antitrust laws or RICO:

> Governmental units of Cook County do not necessarily raise innocent people's taxes by $1 to offset every loss of $1 to fraud. The government is concerned about the overall rate of tax; higher taxes may induce people and business to move away and may depress economic activity. Thus the County, like the purchasers from a monopolist, may try to find substitutes that limit the amount of passing on. Governmental units may tighten the purse strings rather than raise taxes, or they may find other sources of revenue.

Id. at 1177.

Likewise, the court in the instant case criticized the district court for simply presuming that "supply and demand do not interact" in a not-for-profit situation and that the counties could not have been injured by the overcharges alleged:

> The Counties may not have been in competition with others for the sale of sewer services, but surely these counties were in competition with other counties in attempting to attract and retain people and/or industry and commerce. We are

[14]While *Carter* was a RICO action, the court found that the considerations governing RICO standing are identical to those governing antitrust standing; hence, the Court analyzed *Illinois Brick* and *Hanover Shoe* to reach its conclusion. 777 F.2d at 1175-1178.

> not prepared to assume that the availability of cost-effective sewer services cannot affect decisions on where houses will be built, where commercial and industrial enterprises will be located, and where taxpayers will choose to live.

Decision at 15a (citing *Carter* , 777 F.2d at 1177). In other words, here as in *Carter*, the defendants' imposition of illegal overcharges injured the counties' ability to attract residents and businesses—and, hence, to augment their tax base.

Indeed, in this case the uncontroverted Affidavit of Oakland County's Chief Deputy Drain Commissioner establishes that the injury to Oakland went beyond even that identified in *Carter*, because of the manner in which this particular county funds and administers its sewage disposal system. The Affidavit explains that Oakland pays for its sewage interceptors and improvements by issuing bonds in its own name, pledging its full faith and credit for those bonds. Affid. at ¶¶ 9-10. Thus, if Oakland's overall revenue from sewage is reduced because individuals and businesses refuse to locate in Oakland or choose to leave Oakland in reaction to the overcharges, the county risks defaulting on its bonds and injuring both its credit rating and its long-term ability to fund public improvements. Plaintiffs' injury in the present case is thus more than assumption—it is uncontroverted fact. And, like the injury noted in *Carter*, it is an injury that will be suffered by the county regardless of whether it is eventually able to recoup the overcharges.

Petitioners also rely on a purported distinction between "horizontal" and "vertical" tracing of injuries and contend that *Hanover Shoe* only applies where the tracing difficulty is vertical, as between direct and indirect purchasers on the chain of distribution. Nothing in *Hanover Shoe*, however, supports this artificial distinction, nor are petitioners' factual assumptions correct.

The evidence tendered below establishes that there would indeed be a tremendous tracing problem if the indirect purchasers were deemed the proper parties to sue. The manner of distribu-

tion of sewage charges among indirect purchasers (municipalities or individuals) varies widely from sewer district to sewer district, and even within certain districts. That every municipality within the individual districts uses a different method to assess its end users for the sewage charges further heightens the complexity.

In short, determining exactly how much of an overcharge was passed on to a particular indirect purchaser would necessitate an intricate and highly complicated inquiry. It was the spectre of just such evidentiary complexity that underlay the *Hanover Shoe* decision to preclude suit by indirect purchasers, except perhaps in the rarest of cases in which all proof problems are absent. Clearly, this is not such a case.

Finally, petitioners fall back on the pragmatic rules of standing enunciated in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983). As the Court of Appeals recognized, however, examining this case according to the facts set forth in the *Associated General Contractors* decision overwhelmingly supports the counties' right to sue and weighs "heavily in favor of concentrating the full amount of any recovery in the counties . . . ." Decision at 23a.

Among the factors noted in *Associated General Contractors* is the " 'nature of the plaintiff's alleged injury,' " which in the present case is "a classic example of precisely the sort of injury with which the antitrust laws were intended to deal"—overcharges caused by anticompetitive practices. Decision at 23a (quoting *Associated General Contractors*, 459 U.S. at 537). Also relevant is the directness of the injury, which in this case is obvious. *Id.* at 24a. Perhaps most important, however, is the " 'strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits.' " *Id.* at 25a (quoting *Associated General Contractors*, 459 U.S. at 543). In the present case, the Court of Appeals noted that "[a] straightforward action by . . . [the] counties alone would obviously be more manageable than a class action brought on behalf of thousands of remote consumers

whose individual claims would present extraordinary complexities." *Id.* Certainly "[t]he task of making a proper allocation and distribution of any recovery to thousands of end users would be a formidable one, particularly in view of the frequency with which modern Americans change their place of residence." *Id.*[15]

In short, the Court of Appeals properly applied the governing Supreme Court precedent to the facts of the instant case in concluding that the counties have standing to sue. This action falls within no recognized exception to the pass-on rule. Pragmatic considerations support the conclusion that the counties are the most effective plaintiffs to enforce the antitrust laws in this case. The Sixth Circuit's decision should stand.

II. For The Same Reasons, The Counties Also Have Standing Under RICO.

Likewise, the Court of Appeals correctly concluded that the facts supporting the counties' antitrust standing also render them "proper parties to sue for damages allegedly arising out of RICO violations." *Id.* In so ruling, the court relied on two cases from other circuits that squarely confronted and rejected the pass-on defense in the context of RICO actions, *Carter v. Berger*, 777 F.2d at 1173, and *Terre Du Lac Ass'n v Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).[16]

[15]The Court of Appeals also noted that the end users would indirectly benefit if the counties recovered in this litigation, because the counties' "non-profit" legal status would require that any recovery be passed through to the end users. Decision at 23a n.6. Thus, there is no prospect that the direct purchaser would somehow receive an unfair "windfall." In similar circumstances, courts have found that the direct purchaser should have standing. *See Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 335 F.2d 203 (7th Cir. 1964); *Public Utility District No. 1 v. General Electric Co.*, 230 F. Supp. 744 (W.D. Wash. 1964); *Atlantic City Electric Co. v. General Electric Co.*, 226 F. Supp. 59 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964).

[16]The Sixth Circuit did not rely on antitrust precedent to support its finding that the counties had standing under RICO. Rather, the court considered the counties' factual allegations and RICO case law. As a result, petitioners' attempt to contrast the goals underlying the antitrust and RICO statutes to illustrate that the counties lack RICO standing is irrelevant.

In *Carter*, the Seventh Circuit held that a county, rather than its taxpayers, was the proper RICO plaintiff where defendant's actions—bribing county officials to secure lower tax assessments for the property of defendant's clients—directly injured the county. The court specifically stated that the county's RICO standing was not impaired by the possibility that it had passed on the effect of its injury to its taxpayers; "the fact that the County may have recouped the loss by raising the rate of tax does not defeat its recovery." 777 F.2d at 1176. Similarly, the Eighth Circuit in *Terre Du Lac* recognized the RICO standing of a property owners' association, rejecting defendants' argument that the association was not a proper plaintiff because it could pass its injury on to its members. 772 F.2d at 473. In short, *Carter* and *Terre Du Lac* both rejected the pass-on defense in the RICO context, without any exceptions.[17]

Simply put, a plaintiff has a viable RICO cause of action "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). Here, the counties have sufficiently pled a pattern of racketeering on the part of the petitioners—indeed, they rely on essentially the same pattern utilized in the federal indictments to secure the convictions or guilty pleas of many of the petitioners. Moreover, the counties have sufficiently alleged that petitioners' acts directly resulted in the counties' payment of illegally inflated prices for sewage service. The counties have thus met the threshold requirements of RICO standing.

III. These Petitions Do Not Raise Any Questions Requiring This Court's Intervention.

Not only is the decision below clearly correct, but the Petitions fail to demonstrate any ancillary reasons why this case requires

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[17]This is consistent with Congressional intent to generate RICO standing requirements that were, if anything, even less stringent than those applicable to antitrust plaintiffs. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-99 (1985); *Sperber v. Boesky*, 849 F.2d 60, 63 (2d Cir. 1988).

this Court's intervention. There is no split in the circuits on the relevant issue and no threat of double recovery; nor is there any other policy ground that favors the granting of these Petitions.

A. There is No Split In The Circuits.

Petitioners contend that the Sixth Circuit's decision in this case creates a serious "split in the circuits" that requires this Court to grant certiorari in the present case. This is incorrect. The decision of the United States Court of Appeals for the Seventh Circuit in *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.), *cert. denied*, __ U.S. __, 109 S. Ct. 543 (1988), is distinguishable and, in any event, is arguably in conflict with the Seventh Circuit's decision in *Carter*, as well as this Court's governing decisions.

In *Panhandle Eastern*, the United States Court of Appeals for the Seventh Circuit held that the State of Illinois could maintain an antitrust suit against a regulated utility on behalf of residential consumers of gas under the "cost-plus" exception to *Hanover Shoe*, thus permitting suit by the end users rather than the direct purchaser. The Court's decision was explicitly grounded on the unique facts of the case; perhaps more significantly, the utility/direct purchaser in that case (CILCO) had delayed in filing suit, thus raising a serious question whether the statute of limitations had expired. The court held that, as a result, the end users rather than CILCO would most effectively enforce the antitrust laws. In the process, the Seventh Circuit found that regulated industry contracts that include formal cost-plus pricing should come within the "cost-plus" exception to *Hanover Shoe*.

The facts in *Panhandle Eastern* are readily distinguishable from those of the present case. Here, the direct purchasers are governmental entities that, as in *Carter*, may well be able to pass on certain overcharges but almost certainly cannot pass on the injuries caused to their enterprise funds, bond credit, or general ability to attract residents and businesses into their jurisdictions.

Here, too, the counties have every incentive to sue and pursue the action as vigorously as possible; the most effective enforcement of the law against these already-convicted defendants indisputably lies in litigation by the parties who suffered the entire initial antitrust injury. Finally, this case presents the substantial tracing and proof problems that were completely absent in *Panhandle Eastern*. Just attempting to unravel the various billing mechanisms used by Oakland's three sewer districts to charge for sewage services, and then tracking how the individual end users were billed, would place any court squarely within the evidentiary complexities and massive threshold litigation that this Court sought to avoid by means of *Hanover Shoe* and *Illinois Brick*. In short, the substantial factual differences between *Panhandle Eastern* and this case negate the argument that there is a "serious" conflict in the circuits requiring this Court to assume jurisdiction.

Moreover, the precedential value of *Panhandle Eastern* is questionable given the Seventh Circuit's earlier opinion in *Carter v. Berger*, a case that took a different approach to the issue of pass-on and the existence of antitrust injury in a factual situation more similar to the one at hand. In *Carter*, the Seventh Circuit held that a not-for-profit governmental entity suffers injury sufficient to defeat a pass-on defense even if it passes on all of the overcharges. Although *Panhandle Eastern* arguably departed from *Carter*, *Panhandle Eastern* did not purport to overrule or limit *Carter* in any way, perhaps due to the vast factual differences between the two cases. Hence, *Carter* is the Seventh Circuit precedent analogous to the present case, and it fully supports the Sixth Circuit's decision.

Finally, even if a conflict is presumed between the *Panhandle Eastern* court's apparent willingness to manufacture new exceptions and the Sixth Circuit's refusal to do so, it is clear that the present decision represents the correct approach under *Illinois Brick* and *Hanover Shoe*. Recently, the United States Court of Appeals for the Tenth Circuit rejected an attempt to carve out an

exception for regulated industries similar to the one manufactured by the Seventh Circuit in *Panhandle. See In Re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir.), *petition for cert. filed sub nom. Kansas v. The Kansas Power & Light Co.*, 58 U.S.L.W. 3002 (U.S. June 26, 1989). The Tenth Circuit first noted that *Illinois Brick* laid down a firm rule that the proper antitrust plaintiff is the direct purchaser from an antiturst violator. In light of the clarity of the *Illinois Brick* holding, the courts of appeal are not free to "broadly construe the exceptions." *Id.* at 1291.

The Tenth Circuit went on to reject the *Panhandle Eastern* conclusion that the "cost-plus" exception could apply even if the contract did not have both "cost-plus" and "fixed quantity" components. Without the fixed quantity component, the problem of apportionment of damages would still exist even if all of the overcharge were passed on "because there still exists the issue of decreased residential demand caused by the higher price." *Id.* at 1292. In the Tenth Circuit's view, even the purportedly unique facts in *Panhandle Eastern* could not justify broadening the narrow exceptions noted in *Illinois Brick* and *Hanover Shoe*. *Id.*

So holding, the Tenth Circuit stated that "the controlling cases are *Hanover Shoe* and *Illinois Brick*, and not *Panhandle Eastern*." *Id.* at 1293. Indeed, "[i]f we were to adopt the reasoning of *Panhandle Eastern*, we would in reality be carving out yet another exception (regulation of public utilities) to the basic rule that only a direct purchaser may sue for the antitrust violation, and this we are unwilling to do." *Id.* The Sixth Circuit's decision below likewise reflects the view that *Illinois Brick* and *Hanover Shoe* lay down a firm rule with numerous policy justifications, and that courts of appeal are not free to create new exceptions merely because they believe one or another of those policy justifications may not operate in an individual case.

In sum, *Panhandle Eastern* is inapposite for several reasons. First, it is readily distinguishable on its facts. Second, it is not the

Seventh Circuit precedent applicable to the present fact situation. Finally, to the extent there is any arguable deviation from this Court's decisions, it is in *Panhandle Eastern*, not in the present case. This Court should therefore leave it to the Seventh Circuit to resolve any troublesome dicta in *Panhandle Eastern*.

B. This Decision Will Have Relatively Little Impact On The Majority Of Antitrust or RICO Cases.

Finally, this Court should decline to grant certiorari because the present case, while vitally important to its parties, will have little impact on the majority of antitrust or RICO actions. Certainly it poses none of the dangers predicted by petitioners.

First, there is no frequently invoked antitrust or RICO principle at issue in the present case. Rather, it presents the relatively rare question of a governmental entity's standing under *Hanover Shoe*, a matter that appears only to have arisen in a small number of cases, and the decision below provided a logically unassailable analysis of the relevant issues.

Moreover, petitioners' arguments regarding the threat of "double recoveries" are difficult to comprehend. The Allevato Petition asserts that defendants are entitled to a pass-on defense because there is a class action pending against defendants brought by the end users of sewage services in Oakland and Macomb. Allevato Petition at 23. This statement distorts the facts. Only after the district court dismissed the instant case for lack of standing did the end users file the class action, hoping to meet the statute of limitations and preserve *someone's* right to sue these defendants in the event that the district court's decision was upheld. It is axiomatic that, under *Illinois Brick*, the class action cannot proceed if the Sixth Circuit's ruling is upheld.

Petitioners present an equally obscure variation of the "double recovery" argument by asserting that the pass-on defense must be

allowed here because the Court's recent ruling in *California v. ARC America Corp.*, __ U.S. __, 109 S.Ct. 1661 (1989), permits indirect purchasers to sue under state law. Young Petition at 12-15. This is unpersuasive; this Court in *ARC* distinguished its rulings in *Illinois Brick* and *Hanover Shoe* from the separate preemption question involved in *ARC* and took care to negate the notion that *ARC* expanded the scope of the *Hanover Shoe* exceptions.[18] Likewise, the fact that *ARC* expands the states' powers to enforce antitrust laws in no way poses a unique threat to these defendants; every antitrust defendant faces the same risks. Nothing in *ARC* justifies carving out a new exception for these petitioners.

Finally, Petitioner Young goes so far as to suggest that this case presents an excellent chance to reverse or limit the Court's holdings in *Hanover Shoe* and *Illinois Brick*, but does not say why this Court should do so. Young Petition at 15. In fact, the evidence clearly demonstrates that the best chance for the citizens of Oakland and Macomb counties to vindicate their rights against defendants rests in the complaints that are the subject of these Petitions. Nothing in the present case warrants tampering with the reasoning of *Hanover Shoe* and *Illinois Brick*.

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[18]To so argue, petitioners seriously misstate the language of *ARC*. They contend that the *ARC* decision "reaffirmed the continued viability of the cost-plus exception to the rule in *Illinois Brick* and *Hanover Shoe*." Allevato Petition at 14 n.17. Rather, this Court in *ARC* plainly stated that the *Illinois Brick* Court had "noted two possible exceptions," again taking pains to advert to the exceptions as "possible." *ARC*, __ U.S. __, 109 S.Ct. at 1663 n.2.

CONCLUSION

For the reasons set forth above, this Court should deny the Petitions for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by GEORGE W. KUHN, the Oakland County Drain Commissioner, *Plaintiff,* *vs.* THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the ESTATE OF MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL, INC., and WOLVERINE DISPOSAL-DETROIT, INC., *Defendants.*	Civil Action No. 84-CV1068-DT

COMPLAINT

Plaintiff, the County of Oakland, by George W. Kuhn, the Oakland County Drain Commissioner, complains of Defendants as follows:

PRELIMINARY STATEMENT

1. This civil action is brought to recover damages stemming from illegal activities prohibited by the Sherman Act (15 U.S.C. § 1 et seq.) and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961 et seq.). This is also an action for breach of fiduciary duty in violation of 28 U.S.C. § 959.

JURISDICTION AND VENUE

2. The jurisdiction of this Court over Counts I and II is premised upon 15 U.S.C. §§ 4 and 15 (federal antitrust) and over Counts III through VII upon 18 U.S.C. §§ 1964(a) and (c) (Racketeer Influenced and Corrupt Organizations). Federal jurisdiction is also based on 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (commerce) and with regard to Count VIII is based on 28 U.S.C. § 959 (trustees and receivers).

3. Venue is proper in this district under 15 U.S.C. § 22, 18 U.S.C. § 1965 and 28 U.S.C. §§ 1391(b) and (c). All Defendants transact business and can be found within this district, and the acts alleged herein took place within this district.

PARTIES

4. Plaintiff, the County of Oakland ("Oakland County") is a public corporation organized and existing under the Michigan Constitution and the laws of the State of Michigan; the Oakland County Drain Commissioner is the designated agency of Oakland County through which it operates and maintains a sewage system for collecting and transporting sanitary and industrial wastes and storm water generated within its jurisdiction.

5. Defendant City of Detroit ("Detroit") is a municipal corporation organized and existing under the laws of the State of Michigan. The Detroit Water and Sewerage Department ("DWSD"), is the Detroit agency that operates and maintains a sewage system for collecting, transporting, treating and disposing of the sanitary and industrial wastes and storm water generated within Detroit and within certain surrounding communities including Oakland County. DWSD operates and maintains the Detroit Waste Water Treatment Plant (the "DWWTP") for the purpose of treating the sanitary and industrial wastes and storm water collected by DWSD; the DWWTP discharges its treated effluent into navigable waters of the United States.

6. Defendant, Coleman A. Young ("Young") is an individual residing at Manoogian Mansion, 9240 Dwight, Detroit, Michigan. Young is and at all relevant times was the Mayor of Detroit. In that capacity, Young was appointed Administrator of the DWWTP on March 21, 1979, pursuant to an order of the Honorable John Feikens, Chief Judge of the United States District Court for the Eastern District of Michigan, in the case of *United States of America* v. *City of Detroit et al.,* No. 7-71100.

7. Defendant Charles Beckham ("Beckham") is an individual residing at 14220 Stahelin, Detroit, Michigan, and at all relevant times was the Director of DWSD.

8. Defendant Nancy Allevato is the Personal Representative of the Estate of Michael Ferrantino ("Ferrantino"). Ferrantino was an individual who resided at 331 Hampshire Ct., Dearborn, Michigan. At all relevant times Ferrantino was a shareholder and president of Defendants Michigan Disposal, Inc. and Wayne Disposal Inc. He also held an interest in Defendant Wolverine Disposal, Inc. Ferrantino was found guilty of participating in a conspiracy to bribe a public official in violation of 18 USC § 1962(d) on December 9, 1983. Nancy Allevato is sued in her representative capacity for the actions of Ferrantino taken prior to his death.

9. Defendant Darralyn Bowers ("Bowers") is an individual residing at 1851 Wellsley Drive, Detroit, Michigan, and at all relevant times held an interest in Defendant Vista Disposal, Inc. Bowers was found guilty of participating in a conspiracy to bribe a public official in violation of 18 U.S.C. § 1962(d) on December 9, 1983.

10. Defendant Sam Cusenza ("Cusenza") is an individual residing at 50880 Murray Hill Drive, Plymouth, Michigan. Cusenza was at all relevant times nominally a 50% shareholder in, and a Vice President of, Defendants Wolverine Disposal, Inc.

and Wolverine Disposal-Detroit, Inc. Cusenza was found guilty of participating in a conspiracy to bribe a public official in violation of 18 U.S.C. § 1962(d) on December 9, 1983 and pled guilty to racketeering activity in violation of 18 U.S.C. § 1962(c) on January 19, 1984.

11. Defendant Joseph Valentini ("Valentini") is an individual residing at 8583 Winston Lane, Dearborn Heights, Michigan. Valentini was at all relevant times nominally a 50% shareholder in and President of Defendants Wolverine Disposal, Inc. and Wolverine Disposal-Detroit, Inc. Valentini pled guilty to participating in a conspiracy to bribe a public official in violation of 28 U.S.C. § 1962(d) on January 19, 1984.

12. Defendant Charles Carson ("Carson") is an individual residing at 1400 Yorktown, Grosse Pointe Woods, Michigan, and at all relevant times was the attorney for Vista Disposal, Inc.

13. Defendant Walter Tomyn ("Tomyn") is an individual residing at 6950 Killarney, Troy, Michigan. Tomyn was at all relevant times an officer and employee of Michigan Disposal, Inc. and was an engineering consultant to Vista Disposal, Inc.

14. Defendant Vista Disposal, Inc. ("Vista"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 313 Michigan Avenue, Detroit, Michigan.

15. Defendant Michigan Disposal, Inc. ("Michigan Disposal"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 1060 Rawsonville Road, Ypsilanti, Michigan. Michigan Disposal at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

16. Defendant Wayne Disposal, Inc. ("Wayne Disposal"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 49350 North

Service Drive, Van Buren Township, Michigan, and whose registered office is at 331 Hampshire Court, Dearborn, Michigan. Wayne Disposal at all relevant times was in the business of operating a landfill for the processing and disposal of waste, including wastewater sludge.

17. Defendant Wolverine Disposal, Inc. ("Wolverine"), is a corporation organized and operating under the laws of the State of Michigan, whose principal place of business is at 1060 Rawsonville Road, Ypsilanti, Michigan. Wolverine Disposal at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

18. Defendant Wolverine Disposal-Detroit, Inc. ("Wolverine-Detroit"), is a corporation organized and operating under the laws of the State of Michigan, which maintained its principal place of business within this District, and whose registered office was at 1060 Rawsonville Road, Ypsilanti, Michigan, until on or about October 28, 1980, and thereafter at 313 Michigan Avenue, Detroit, Michigan. Wolverine-Detroit at all relevant times was in the business of hauling, processing and disposing of wastewater sludge.

FACTS

19. Oakland County operates and maintains three sewage disposal districts known as the Evergreen-Farmington District, the Southeastern Oakland County Sewage Disposal District and the Clinton-Oakland Sewage Disposal System. Oakland County has entered into three separate contracts with Detroit and DWSD for the transportation, treatment and disposal of sewage from each of the three districts. The treatment and disposal is performed by DWWTP.

20. Detroit charges Oakland County according to the costs incurred by Detroit in providing the treatment and disposal service. Oakland County, in turn, collects revenues from municipalities within each district and pays Detroit. Detroit has always

passed through to Oakland County a portion of all costs incurred in the treating and disposal of wastes at DWWTP, including the costs for sludge and scum hauling disposal. Sludge and scum are two of the end products of treating sewage.

21. On May 6, 1977, the United States brought a civil action (No. 7-71100) in the United States District Court for the Eastern District of Michigan (the "District Court") against Detroit and the DWSD for discharging pollutants from the DWWTP into navigable waters of the United States in violation of federal laws and regulations. Detroit and DWSD entered into a Consent Judgment effective September 9, 1977, in which they agreed among other things to upgrade the DWWTP in order to bring its discharges into compliance with applicable laws and regulations.

22. On October 18, 1978, the District Court issued an Order to Show Cause why Detroit and DWSD were not moving more quickly toward compliance with the Consent Judgment. After holding hearings pursuant to the Order To Show Cause, the District Court issued an Order on March 21, 1979, appointing Young as Administrator of the DWWTP. The Order provided in part that the appointment was "for the purpose of carrying out the obligations of Detroit under the Consent Judgment" but "would not have the effect of relieving Detroit of its obligations under the Consent Judgment".

23. Prior to 1979, limited amounts of sludge were removed from the sewage treated by DWWTP and that sludge was either incinerated or discharged into the Detroit River. As a result of the Consent Judgment, after 1979, DWWTP was required to remove increased amounts of sludge, and those amounts which could not be incinerated were required to be disposed of by means which complied with applicable environmental regulations.

24. On May 1, 1979, Detroit entered into a contract known as PC 439 with Michigan Disposal for hauling and disposal by landfill (an operation hereafter described as "disposal") of the sludge

that was not incinerated. This contract was effective from July 1, 1979 through June 30, 1983. On October 15, 1980, it was amended to include the disposal of scum from DWWTP, and in 1982 it was amended again to run through June 30, 1985. Both Michigan Disposal and Wayne Disposal were then owned by Ferrantino. Tomyn was at all times an employee of Michigan Disposal. Ferrantino and Tomyn caused Michigan Disposal to haul the sludge and scum to Wayne Disposal's landfill. A significant portion of the funds paid by Detroit to Michigan Disposal, a portion of which Detroit had received from Oakland County, were paid by Michigan Disposal to Wayne Disposal.

25. One other company, Nytrex, obtained a contract from Detroit for sludge disposal during 1979. Nytrex, reportedly, was unable to find a suitable landfill for the sludge. As a result, Michigan Disposal was, in fact, the sole sludge disposal contractor for Detroit during 1979.

26. Toward the end of 1979, DWSD realized that DWWTP needed to dispose of increasing quantities of sludge. Ferrantino, Tomyn and Michigan Disposal, aware of these circumstances, submitted an unsolicited proposal to DWSD to increase the minimum volume of sludge disposal guaranteed to Michigan Disposal. Michigan Disposal also proposed, on or about March 19, 1980, to construct a holding pad at the DWWTP that would permit stabilization, accumulation and storage of the sludge for at least 12 hours prior to disposal. Engineering plans for the pad were prepared by Tomyn. DWSD rejected the unsolicited proposal of Michigan Disposal based on its conclusion that operating with only a single contractor for sludge disposal was a serious disadvantage to Detroit.

27. After the unsolicited Michigan Disposal proposal was rejected by the DWSD, Ferrantino took steps to (a) circumvent the decision of the DWSD, (b) perpetuate the monopoly of Michigan Disposal, Wayne Disposal and Ferrantino, (c) exclude competition in the disposal of sludge from DWWTP, and (d) fix the price

for those services. The steps included establishing a front company that would hide the interests of Ferrantino, Michigan Disposal and other conspirators and securing a second sludge disposal contract from the City for the front company at prices identical to those charged by Michigan Disposal.

28. Ferrantino obtained the agreement of Bowers to advance the scheme described in paragraph 27 hereof. From at least 1979 Bowers was a friend and confidant of Young and Beckham.

29. In or about the end of 1979 Ferrantino and Bowers conspired to (a) form the front company that would secure the second sludge disposal contract, (b) use Bower's influence with Young and Beckham to procure that contract, and (c) hide their interests, those of Michigan Disposal and others from the public. In furtherance of this conspiracy Bowers sought the participation of Jerry Owens ("Owens"), to head the front company. Owens had no prior connection with either Detroit, Ferrantino or sludge hauling.

30. At meetings in February and March, 1980, Bowers introduced Owens to Ferrantino, Tomyn, Cusenza and Valentini. Cusenza and Valentini were former employees of Michigan Disposal who had established a separate hauling company, Wolverine. Ferrantino held an interest in Wolverine.

31. Ferrantino, Bowers, Tomyn, Cusenza, Valentini and Owens, agreed (a) that they would form a "front" company to be known as Vista Disposal, Inc., (b) that Owens would falsely hold himself out as its sole owner, and (c) that the company would be used to secure a sludge disposal contract from Detroit. They also agreed that Tomyn would provide Vista with all necessary engineering services, Cusenza and Valentini would provide Vista with all necessary financing and equipment through Wolverine and Wolverine-Detroit, Ferrantino would provide Vista with a licensed and permitted landfill (Wayne Disposal's landfill) and Bowers would use her influence with Young and Beckham to obtain the contract for Vista.

32. On March 28, 1980, before Vista was formally incorporated, Owens and Bowers caused an unsolicited letter to be sent to Detroit in the name of Vista expressing interest in bidding on a sludge disposal contract. Vista proposed to charge Detroit the same prices as Detroit was then being charged by Michigan Disposal.

33. In or about April 1980, Owens met with Beckham to discuss the Vista proposal. Thereafter, on May 9, 1980 Vista submitted, directly to Beckham, further details of its hauling and disposal proposal, many of which had been prepared by Tomyn. The May 9th proposal included construction at the DWWTP of a sludge holding pad that would permit stabilization of the sludge before hauling and would permit the storage of sludge for at least 12 hours. The proposal also contained a false statement of Vista's ownership by Owens and a false resume of Owens' education and experience, and otherwise failed to disclose material information concerning ownership, legal and equitable interests in, financial condition, and corporate history of Vista and its ability to independently perform the tasks it was proposing to perform.

34. Between May 9, 1980 and June 30, 1980 Bowers spoke with Young and Beckham for the purpose of obtaining their influence to speed consideration of and grant Vista's proposal. Young and Beckham each agreed with Bowers to grant the proposal. At the time each did so they knew, or should have known, that Vista was being used to hide the interests of Bowers and others and was unable to independently perform the tasks it was proposing.

35. In 1980, Detroit and its agents and agencies, including the DWSD, were required to contract for supplies, materials and services through one of two procurement processes, (a) competitive bid, or (b) requests for proposals (RFP). When contracts were to be awarded by competitive bid, Detroit was required to award the contract to the lowest qualified bidder. When contracts were to be awarded following issuance of an RFP, the contract award would be based on a combination of factors which included consideration of both the contractor's qualifications to provide

the needed supplies and/or services and price. On occasion, issuance of an RFP would be preceded by a Request for Qualifications (RFQ). An RFQ was designed to invite prospective contractors to submit their qualifications for solving particular problems. Based on a review of responses to an RFQ, Detroit's department or agency involved would issue an RFP to these firms or entities whose RFQ response indicated a capability to provide the needed service to resolve the pending problem.

36. On or about June 30, 1980, Beckham announced to David Fisher, an employee of the DWSD that he wanted the Vista proposal implemented. Fisher advised Beckham that Detroit was obligated to permit the public to bid on such contracts and recommended that Detroit prepare and publish a request for proposals (RFP) from qualified bidders. Beckham rejected that procedure and instead on or about July 15, 1980, elected to publish only an RFQ for potential contractors. The RFQ ostensibly sought to identify contractors capable of constructing a sludge mixing pad on site at the DWWTP and perform hauling of sludge to augment services then being provided by Michigan Disposal pursuant to PC 439. The RFQ sought information concerning the qualifications of prospective contractors in five (5) areas including (a) whether the contractor had access to a landfill site for dumping sludge, (b) whether the contractor had performed successfully in the field of sludge disposal in the past, (c) whether the contractor had adequate resources available to perform the contemplated task; (d) a disclosure of corporate identity, and (e) a statement from a bonding company concerning bondability of a minimum of $250,000.

37. Vista responded to the request for qualifications on July 21, 1980. The response was similar to its proposal of May 9, 1980, contained the same false statements and omissions, and misrepresented that it could comply with the specifications of the RFQ set forth in paragraph 36.

38. On or about August 8, 1980, the DWSD, through Beckham, notified Vista by mail that it had been selected from among those who responded to the RFQ to submit a formal contract for the hauling and disposal of sludge from DWWTP.

39. Carson, an attorney, was hired by Vista, at the suggestion of Ferrantino, to prepare the contract and negotiate its terms with Detroit. Carson was, at all relevant times, aware that Vista was not owned entirely by Owens and that the interests of Ferrantino, Bowers, Cusenza, Valentini, Michigan Disposal, Wolverine and Wolverine-Detroit had been and were to be concealed. Carson participated in the concealment of the interests of Ferrantino, Bowers, Cusenza, Valentini, Michigan Disposal, Wolverine and Wolverine-Detroit in Vista and facilitated the purpose of the concealment by (a) assisting Vista to avoid the financial investigation that would have been otherwise required had Detroit insisted on a performance bond, (b) aiding Owens in the submission of false information concerning Owens and Vista to the Human Rights Department of Detroit, and (c) negotiating with Detroit to eliminate a proposed contract provision which would have prohibited Vista from assigning proceeds from the contract to the persons and entities holding concealed interests in the company.

40. The contract with Vista, known as PC 483, was submitted by Beckham to the City Council of Detroit (the "Council") for approval in October, 1980. Information provided to Council staff by Beckham and which was available to the Council misrepresented Owens as the sole owner of Vista and failed to disclose Owens' background and work experience. The Council deferred consideration of the proposed contract until Beckham and DWSD had an opportunity to answer certain questions propounded by the Council.

41. Beckham and DWSD did not answer the Council's questions. Instead, Young, with the assistance of Beckham, bypassed the Council. On October 20, 1980, Young approved PC 483 purportedly acting under his authority as Administrator of the

DWWTP, all with the effect and purpose of avoiding public scrutiny of PC 483.

42. Thereafter, Bowers, with the knowledge and assistance of Ferrantino, Cusenza, Valentini, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista, paid monies to Beckham for his aid and influence in the award of PC 483 to Vista and to corrupt his judgment in the subsequent administration of PC 483 and PC 439. Bowers made $2,000.00 payments to Beckham on November 1, 1980, December 1, 1980, January 6, 1981, January 27, 1981, June 2, 1981, August 5, 1981 and September 4, 1981, and $4,000.00 on May 5, 1981. She also arranged for Beckham to receive other things of value.

43. During the latter part of October, 1980, Vista entered into a joint venture with Wolverine-Detroit (the joint venture is hereafter referred to as "Vista/Wolverine") for the purpose of performing PC 483. Vista was paid for construction of the sludge holding pad and for disposal of sludge from the DWWTP. The prices charged by Vista and paid by Detroit for disposal of sludge were the same prices charged by Michigan Disposal under PC 439.

44. Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Owens, Young, Beckham, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista combined and conspired to do one or more of the following:

(a) Exclude competition for PC 483 and secure that contract for Vista;

(b) Fix the price for disposal of DWWTP sludge;

(c) Obtain a monopoly over the disposal of DWWTP sludge; and

(d) Obtain approval of a price increase for PC 439 and PC 483 after those contracts had been executed.

45. Young and Beckham each performed the acts alleged above in their official capacities as agents and officers of Detroit.

46. The request for proposals for PC 483, the letting of PC 483, the construction of the sludge holding pad, and the hauling and disposal of DWWTP sludge are activities conducted in and which substantially affect interstate commerce.

COUNT I

SHERMAN ACT, RESTRAINT OF TRADE

47. Plaintiff realleges paragraphs 1 through 46.

48. Beginning in 1979 and continuing through at least 1983, the Defendants entered into and engaged in a combination or conspiracy in restraint of trade in violation of 15 U.S.C. § 1 by one or both of the following acts:

(a) Fixing the price for disposal of DWWTP sludge;

(b) Excluding competition for disposal of DWWTP sludge with the effect of fixing the price for that service.

49. Plaintiff has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Defendants' unlawful conduct.

WHEREFORE, Plaintiff prays for entry of judgment against all Defendants, jointly and severally:

I. Permanently enjoining the conduct alleged above;

II. Awarding Plaintiff its damages trebled as provided by 15 U.S.C. § 15;

III. Awarding Plaintiff its costs and attorneys' fees as provided by 15 U.S.C. § 15; and

IV. Granting such further and different relief as the Court deems just.

COUNT II

SHERMAN ACT, MONOPOLIZATION

50. Plaintiff realleges paragraphs 1 through 46.

51. Beginning in 1979 and continuing through at least 1983, the Defendants monopolized the hauling and disposal of sludge in the market consisting of the DWWTP, in violation of 15 U.S.C. § 2.

52. The Defendants combined to unlawfully permit, acquire and maintain a monopoly over the disposal of DWWTP sludge by participating in one or more of the following acts:

(a) Creating a shell corporation for the purpose of hiding interests in Vista;

(b) Deceiving the public and the City Council of Detroit as to those persons holding interests in Vista;

(c) Submitting false and fraudulent information regarding PC 483;

(d) Utilizing and exercising the influence of public officials to surreptitiously obtain PC 483, exclude competition for PC 483, and raise the prices under and extend the time periods of PC 439 and PC 483;

(e) Fixing the price for disposal of DWWTP sludge; and

(f) Bribing Beckham.

53. Plaintiff has been injured in its property and business in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Defendants' unlawful conduct.

WHEREFORE, Plaintiff prays for entry of judgment against all Defendants, jointly and severally:

I. Permanently enjoining the conduct alleged above;

II. Awarding Plaintiff its damages trebled as provided by 15 U.S.C. § 15;

III. Awarding Plaintiff its costs and attorneys' fees as provided by 15 U.S.C. § 15; and

IV. Granting such further and different relief as the Court deems just.

COUNT III

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

54. Plaintiff realleges paragraphs 1 through 46.

55. This is a civil action brought by Oakland County against Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

56. Plaintiff Oakland County is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

57. Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

58. Vista is an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) which engaged in, and the activities of which affected, interstate commerce within the meaning of 18 U.S.C. §§ 1962(c).

59. Michigan statutes (MCLA § 750.117 and § 750.118) make it a felony to bribe a public officer, agent, servant, or employee in order to influence such person's actions, and also make it a felony to accept such bribe.

60. At all times relevant herein, Article 2, Section 2-106, paragraphs one and two, of Detroit's Charter prohibited elective officers, appointees and employees from participating in any matter on behalf of Detroit if such person had a conflict of interest. These provisions are shown by Exhibit "A" attached.

61. At all times relevant herein, Article 20 of contract PC 483 contained specific provisions to require disclosure of conflicts of interest, and to prevent contracts with Detroit if a conflict of interest was present concerning any transaction. These provisions are shown by Exhibit "B" attached.

62. Users of services provided by the DWSD have a right to have Detroit, acting through its public officials, agents and contractors, conduct the business of the DWSD in accordance with Detroit's established procurement procedures as referred to in paragraph 35 hereof, *Standards* of *Conduct* as referred to in paragraph 60 hereof, contract provisions relating to *Conflict* of *Interest*, as referred to in paragraph 61 hereof, the laws of the State of Michigan, as referred to in paragraph 59 hereof, and to, in all other manners and respect, have the business of the DWSD, and in particular, the DWWTP, conducted honestly, fairly and impartially, free from corruption, collusion, partiality, disloyalty, undue influence, conflicts of interest, favoritism, bribery and fraud.

63. Notwithstanding the foregoing, Beckham, Bowers, Ferrantino, Cusenza, Valentini, Carson, Tomyn, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit knowingly, willfully and unlawfully performed the acts described in

paragraphs 26 through 46 as a scheme and artifice that they had devised and intended to devise:

(a) To defraud the users of services provided by the DWSD of their right to have the business of the DWSD conducted honestly, fairly, impartially, free from corruption, collusion, partiality, disloyalty, dishonesty, undue influence, conflicts of interest, favoritism, bribery and fraud;

(b) To obtain Contract PC 483 and monies paid thereunder by means of false and fraudulent pretenses, representations, and omissions of material facts, knowing and intending that the pretenses, representations and omissions were false, fraudulent and material when made or omitted, and for the purpose of obtaining the aforesaid contract and monies; and

(c) To (i) circumvent the DWSD's decision that having a single contractor for sludge disposal was a serious disadvantage to system users, (ii) perpetuate the monopoly of Michigan Disposal, Wayne Disposal and Ferrantino, (iii) exclude competition for the disposal of sludge from the DWWTP, (iv) fix the price for those services, and (v) maximize profitability of operations under PC 439, all by means of false and fraudulent pretenses, representations, and omissions of material fact knowing that said pretenses, representations and omissions were false, fraudulent and material when made or omitted.

64. Beckham, Bowers, Ferrantino, Valentini, Cusenza, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, for the purpose of executing the aforementioned scheme and artifice, knowingly and repeatedly caused the mails to be used including, but not limited to, the following instances:

DATE	DESCRIPTION
August 8, 1980	An envelope containing a letter dated August 8, 1980 from the Water and Sewerage Department, City of Detroit signed by the Director, Charles Beckham, advising

	Vista that it was selected to submit a formal proposal for the hauling and disposal of sludge at the Wastewater Treatment Plant, addressed to Jerry B. Owens, Vista Disposal, Inc., 1880 City National Bank Building, Detroit, Michigan 48226.
October 22, 1980	An envelope containing a letter dated October 22, 1980, from the Water and Sewerage Department, City of Detroit signed by the Director, Charles Beckham, directing Vista to begin work under Contract No. PC 483 addressed to Vista Disposal, Inc., 1880 City National Bank Building, Detroit, Michigan 48226.
November 18, 1980	An envelope containing a financial statement which indicated a security interest was obtained by Wolverine Disposal, Inc. in certain types of property of Vista Disposal, Inc. addressed to U.C.C. Unit, Secretary of State, Lansing, Michigan.

In addition, from on or about April 2, 1981, through at least December 10, 1981, Beckham, Bowers, Ferrantino, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit caused checks issued by Detroit and made payable to Vista Disposal, Inc. to be delivered by mail to Vista at 313 Michigan Avenue, Detroit, Michigan 48226.

65. Defendants Beckham, Detroit, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit were employed by or associated with the enterprise referred to in paragraph 58 and conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs, through a pattern of racketeering activ-

ity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is,

(a) Mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, or

(b) Bribery, in violation of MCLA § 750.117 and § 750.118.

66. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

COUNT IV

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT CONSPIRACY

67. Plaintiff realleges paragraphs 1 through 46 and 55 through 64.

68. Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit conspired to violate 18 U.S.C. § 1962(c) by agreeing to conduct or participate in the affairs of the enterprise referred to in paragraph 58 through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(A) or (B) and (5), that is,

(a) Mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, or

(b) Bribery, in violation of MCLA § 750.117 and § 750.118.

69. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(d) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Detroit, Beckham, Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

COUNT V

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

70. Plaintiff realleges paragraphs 1 through 46 and 59 through 64.

71. This is a civil action brought by Oakland County against Detroit and Beckham under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

72. Plaintiff is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

73. Defendants Detroit and Beckham are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

74. The DWSD is an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) which engaged in, and the activities of which affected interstate commerce within the meaning of 18 U.S.C. § 1962(c).

75. Detroit and Beckham were employed by or associated with the enterprise referred to in paragraph 74 and conducted or participated, directly or indirectly, in the conduct of the DSWD's affairs through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery, in violation of MCLA § 750.118 or mail fraud in violation of 18 U.S.C. 1341 and 18 U.S.C. § 2.

76. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of its sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the

direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Detroit and Beckham, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c);

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

COUNT VI

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

77. Plaintiff realleges paragraphs 1 through 46 and 59 through 64.

78. This is a civil action brought by Oakland County against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961, et. seq.

79. Plaintiff Oakland County is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

80. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit are persons within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

81. Vista, Michigan Disposal, Wayne Disposal, Wolverine, Wolverine-Detroit and Vista/Wolverine, for the common pur-

pose of accomplishing the objectives of paragraph 63, were associated in fact and constituted an enterprise within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which engaged in and the activities of which affected interstate commerce.

82. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit were employed by or associated with the enterprise referred to in paragraph 81 and conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs, through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery in violation of MCLA § 750.117 or mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2.

83. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(c) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

COUNT VII

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT CONSPIRACY

84. Plaintiff realleges paragraphs 1 through 46 and 59 through 64 and 78 through 81.

85. Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit conspired to violate 18 U.S.C. 1962(c) by agreeing to conduct or participate in the affairs of the enterprise referred to in paragraph 81 through a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(A) or (B) and (5), that is, bribery in violation of MCLA § 750.117 or mail fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2.

86. Plaintiff has been injured in its business and property by reason of violations of 18 U.S.C. § 1962(d) committed by the aforesaid Defendants within the meaning of 18 U.S.C. § 1964(c), in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by the aforesaid Defendants' unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for entry of a judgment against Defendants Ferrantino, Bowers, Cusenza, Valentini, Tomyn, Carson, Vista, Michigan Disposal, Wayne Disposal, Wolverine and Wolverine-Detroit, jointly and severally:

I. Awarding Plaintiff its damages trebled as provided by 18 U.S.C. § 1964(c),

II. Awarding Plaintiff its costs and attorneys' fees as provided by 18 U.S.C. § 1964(c).

COUNT VIII

BREACH OF FIDUCIARY DUTY

87. Plaintiff realleges the allegations contained in paragraphs 1 through 46, and 59 through 64.

88. Young, as Court-appointed Administrator of the DWWTP, was charged with managing all of the property of the DWWTP, in the same manner and to the same extent as DWWTP was charged, all in accordance with the laws of the State of Michigan. Young may be sued with respect to any of his acts, transactions or omissions in carrying on the business connected with DWWTP and its property pursuant to 28 U.S.C. § 959.

89. Pursuant to his appointment and the laws of the State of Michigan, Young, as a Court-appointed Administrator, owed a fiduciary duty of confidence, loyalty, good faith and fair dealing to Oakland County. This fiduciary duty required Young to act in an impartial manner concerning all property and administrative duties placed under his management, and to at all times manage and administer the DWWTP in accordance with applicable laws and the Order which appointed him Administrator.

90. Young breached the fiduciary obligations owed to Plaintiff by virtue of the following acts and omissions:

(a) Young abused his powers as Administrator by effectively restricting consideration of available bidders on PC 483 to one bidder.

(b) Young abused his powers as Administrator by failing to deal at arm's length when awarding contract PC 483 to a friend and by concealing this fact from the public.

(c) Young abused his powers as Administrator by executing PC 483 when Young knew, or reasonably should have

known, (i) that the bidder information and contract data submitted by Vista was false, and that Vista was incapable of independently providing the service proposed, (ii) that the rates of compensation contained in that contract were extravagant and wasteful, and (iii) and that officials, agents and servants of Detroit had negotiated and proposed this contract in violation of federal laws, state laws and charter provisions.

(d) Young abused his powers as Administrator by allowing the costs charged under contracts PC 439 and PC 483 to be arbitrarily and capriciously raised after those contracts were in place without regard to the pre-existing contractual rights of Detroit, and did so without the benefit of competitive bidding to support the reasonableness of those increases.

(e) Young abused his powers as Administrator by arbitrarily and capriciously agreeing to extend the time periods of contracts PC 439 and PC 483.

(f) Young abused his powers as Administrator by failing to maintain and use sufficient accounting, auditing, investigatory and operating guidelines and procedures to promptly discover and then eliminate inefficient, wasteful, false and unlawful costs and expenses which PC 439 and PC 483 imposed on the sewage disposal system.

(g) Young abused his powers as Administrator by continuing to honor PC 439 and PC 483 long after he knew or reasonably should have known that said contracts were the result of fraud, that bribery and the corruption of public officials had occurred, and that said contracts were wasteful.

91. At no time prior to public disclosure of the indictments in *U.S. v. Beckham, et. al.*, Criminal No. 83-CR-60070-DR, did Young divulge to Oakland County or its officials, agents, employees, or attorneys the breaches of fiduciary duty described above.

92. Plaintiff has been injured in its property and business in that the amounts paid to Detroit by Plaintiff for the treatment and disposal of sewage have been unconscionably and unlawfully inflated. The unconscionable and unlawful inflation is the direct

and proximate result of the artificially high costs of the disposal of DWWTP sludge caused by Young's breaches of fiduciary duty.

WHEREFORE, Plaintiff prays for entry of a judgment against Young:

I. Awarding Plaintiff its damages in such sum as the evidence may show is due, together with interest, costs and attorney fees.

II. Granting Plaintiff such further and different relief as the Court deems just.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

THE COUNTY OF OAKLAND, by GEORGE W. KUHN, the Oakland County Drain Commissioner,

Plaintiff.

vs.

THE CITY OF DETROIT, COLEMAN A. YOUNG, CHARLES BECKHAM, NANCY ALLEVATO, as Personal Representative for the Estate of MICHAEL FERRANTINO, DARRALYN BOWERS, SAM CUSENZA, JOSEPH VALENTINI, CHARLES CARSON, WALTER TOMYN, VISTA DISPOSAL, INC., MICHIGAN DISPOSAL, INC., WAYNE DISPOSAL, INC., WOLVERINE DISPOSAL-DETROIT, INC.,

Defendants.

Case No. 84-CV1068-DT
Hon. Richard F. Schrheinrich

AFFIDAVIT OF ROBERT H. FREDERICKS II IN SUPPORT OF THE MOTION TO ALTER JUDGMENT

ROBERT H. FREDERICKS II, being sworn, declares:

GENERAL BACKGROUND

1. Based on my personal knowledge and observation, I can testify as to the following facts:

2. I am currently the Chief Deputy Drain Commissioner for Oakland County and have held that position since April 13, 1976.

3. In 1942 (and as amended in 1958), pursuant to Mich. Comp. L. Ann. 46.171 et seq. ("Act 342"), the Oakland County Board of Supervisors adopted a resolution which established the "Southeastern Oakland County Sewage Disposal District" (S.O.C.S.D.D.) for the purpose of creating a system of sewer and sewage disposal improvements and services for the various municipalities so named. In addition, that resolution designated the Oakland County Drain Commissioner as the "County Agency" for that district.

4. The "County Agency", pursuant to Mich. Comp. L. Ann. 46.173, is charged with "the supervision and control of the management and operation of all improvements, facilities and services" established pursuant to that Act. In addition, the County Agency has the duty *inter alia* "to obtain or prepare data for and determine rates, charges and assessments to be imposed and collected for any improvements, facilities, and services authorized . . . " and "to review and make adjustments of rates, charges, and assessments where the same are deemed excessive or inadequate; (and) to engage consultants, assistants, attorneys, and employees".

5. Oakland County, pursuant to Mich. Comp. L. Ann. 123.731 et seq. ("Act 185"), established the Evergreen-Farmington Sewage Disposal District in 1957 (and as amended in 1958), and the Clinton-Oakland Disposal District in 1967 for the purpose of disposing of the sewage from those districts and the municipalities which are constituent members of those Districts.

6. Pursuant to the provisions of Miscellaneous Resolution No. 7991 adopted by the Oakland County Board of Commissioners on June 2, 1977, the County Drain Commissioner was authorized to represent the interest of the County and the three above named sewage disposal districts in connection with litigation then pending in the United States District Court entitled *United States vs. City of Detroit, et al.*, Civil Action No. 77-71100.

7. Pursuant to the provisions of Miscellaneous Resolution No. 84047 adopted by the Oakland County Board of Commissioners on March 8, 1984, Oakland County authorized the filing and prosecution of this lawsuit in the name of the County with respect to the three above named sewage disposal districts.

OAKLAND COUNTY IS NOT A "MERE CONDUIT"

8. Oakland County constructed, owns, operates and maintains the sewer systems which connect the municipalities' systems to the Detroit wastewater treatment system. To provide this and other related services the County maintains a staff of approximately 150 persons.

9. Pursuant to Act 342 and Act 185, the County has issued bonds for the construction of sanitary interceptor sewers for which the County has pledged its full faith and credit. For example:

(a) S.O.C.S.D.D. Dequindre interceptor, Bond Resolution No. 4060, dated November 7, 1962.

(b) Clinton-Oakland, Paint-Creek Interceptor, Bond Resolution No. 5433, dated July 2, 1970.

(c) Evergreen-Farmington: Misc. (bond) Resolution 3494, dated February 24, 1959.

10. The County has also issued bonds in its name and pledged its full faith and credit for improvements to the lateral sewage systems for the various municipalities. For example: Waterford Township Extension, Oakland County Bond Resolution No. 8343, dated February 16, 1978.

11. Oakland County has entered into three separate contracts with the City of Detroit for the disposal and treatment of the sewage flows originating within each of its three sewage disposal

districts: Evergreen-Farmington (December 30, 1958); S.O.C.S.D.D. (November 23, 1942, renewed November 1, 1962); and Clinton-Oakland (February 5, 1968).

12. Oakland County has entered into two additional contracts with the City of Detroit for the use of certain city sewers with regard to the Evergreen-Farmington District (dated December 30, 1958) and the S.O.C.S.D.D. (dated November 28, 1962).

13. Oakland County owes an obligation to its constituent municipalities to obtain for its sewage disposal districts, sewage disposal services at the best possible cost from the City of Detroit. Such a duty requires Oakland to monitor and participate, where feasible, in Detroit's complex rate making system. Obtaining the best possible cost and monitoring Detroit's rate making system are two of the principal sewer related activities performed by the County.

14. In computing its rates, Detroit utilizes computer-driven rate models to accommodate volumes of accounting, engineering, and economic data as well as complex formulas used for calculating estimates and projections. In determining its costs, Detroit considers a number of factors including (but not limited to), costs incurred at the Sewage Treatment Plant (e.g. sludge disposal costs), as well as costs that result from special service to particular customers (e.g. costs associated with Detroit's intra-city service or costs associated with the Oakland-Macomb Interceptor System) which are assigned directly to those contracting parties. The imperfect nature of this complex process is evidenced by the necessity to provide a "look back" adjustment procedure to correct estimates and projections as well as by the fact that Detroit's rates have been challenged by Oakland County every year since 1975. It is Oakland that brings the challenges, not the municipalities or Oakland's individual rate payers.

15. The City of Detroit bills the Clinton-Oakland District and the Evergreen-Farmington District based on the master sewer

meter readings at the point(s) of connection between Detroit and the Districts. The S.O.C.S.D.D., pursuant to its contract, prepares its own statement of what is owed, based on water consumption readings and storm water calculation, and sends that to Detroit with payment. These arrangements allow Detroit to bill the Districts without regard to how billings are computed and collected at the municipal level.

16. (a) The computation of billings sent to municipalities by the Districts is a complex process involving different methods of calculating volumes of sewage based on water consumption and other data. For example:

(i) Clinton-Oakland charges a flat rate per the total number of "units" connected in accordance with a unit assignment factor schedule developed by the County. This is necessary because of the large number of users in that District without metered water supplies. When water consumption metering is available in that District, a flat rate per 1000 CF is charged. Penalties are charged if a municipality demonstrates "peak flows" over limits established by the County.

(ii) In the Evergreen-Farmington District, bills to municipalities are based on master water meter readings if available. If not available, then by individual water meter readings multiplied by a factor of 1.108. If no water meter readings are available, then charges are based on "unit" factors developed by the County. Some municipalities in Evergreen-Farmington also receive a storm water charge.

(iii) In the S.O.C.S.D.D., the charges are based on master water meter readings. In addition, because that District has combined sanitary/storm sewers, a storm water charge is made based on an average of the previous ten-years of residual (non-sanitary) flows.

(iv) Clinton-Oakland and Evergreen-Farmington bill municipalities quarterly while S.O.C.S.D.D. bills municipalities monthly. All Districts bill for High Strength Surcharges and Non-residential flow surcharges where applicable. To com-

pound this rate making complexity, some municipalities are partially located in two different districts and receive two different billings from the County.

(v) To the charge received from Detroit, all of the Districts add a charge for their own operating and maintenance costs as well as a charge for contribution to a reserve fund.

(b) Regardless of the method of calculation, the County's collection of and administration of money from the municipalities follows procedures established by the Municipal Finance Officers Association as prescribed by the Michigan State Treasurer (See Mich. Comp. L. Ann. 141.421), which require the use of an enterprise fund method. Oakland, therefore, collects the sewage treatment charges which have been billed to the municipalities and deposits such receipts with the County Treasurer in the County's name. Importantly, the County maintains separate, segregated accounts ("Funds") which reflect the receipts collected for each sewer district. Oakland administers those Funds and pays Detroit's sewage treatment bills from those Funds. Oakland pays Detroit out of those funds without regard to whether the municipalities pay in full or on time. Any recovery by Oakland in this litigation will be credited to the Funds.

17. In addition to its District obligations, Oakland County has contracted with four municipalities, Keego Harbor, Bloomfield Hills, Farmington Hills and Bingham Farms, to actually operate those municipalities' own water/sewer systems. Such operation includes user billing, collections, connections, maintenance; i.e. all operating functions normally provided by a municipality. The County even calculates the appropriate municipal sewage rate for adoption by these municipalities.

18. Oakland County is incidently, an end user and rate payer of the County System. Wastes from County buildings are discharged into municipal systems which are part of the three Dis-

tricts. Oakland County pays the respective municipalities for their services just as any other user.

19. To a great extent, all the municipalities in the three districts rely on the expertise of Oakland with regard to: (a) the technical and physical operation of the systems; (b) the determination of whether the Detroit rate is fair in amount and properly allocated among the different customer classes; and (c) the administrative/legal aspects. For example, Oakland County coordinates the participation of the municipalities in the system by preparing uniform engineering specifications, billing procedures (per District), and uniform resolutions for each municipality to adopt.

MUNICIPAL SEWER SYSTEMS SUFFER NO MORE INJURY THAN OAKLAND COUNTY

20. The Southeast Oakland County Sewage Disposal District consists of the following municipalities: Royal Oak, Troy (i.e. that portion not included in Evergreen-Farmington), Southfield (i.e. that portion not included in Evergreen-Farmington), Royal Oak Township, Pleasant Ridge, Oak Park, Madison Heights, Huntington Woods, Hazel Park, Ferndale, Clawson, Birmingham (i.e. that portion not included in Evergreen-Farmington), Berkley, and the village of Beverly Hills (i.e. that portion not included in Evergreen-Farmington).

21. The Evergreen-Farmington Sewage Disposal District consists of the following municipalities: Birmingham (that portion not included in S.O.C.S.D.D.), Bloomfield Hills, Farmington, Farmington Hills, Keego Harbor, Lathrup Village, Southfield (i.e. that portion not included in S.O.C.S.D.D.), Troy (i.e. that portion not included in S.O.C.S.D.D.), Bloomfield Township, Auburn Hills (i.e. that portion not included in Clinton-Oakland), West Bloomfield (i.e. that portion not included in Clinton-Oakland), and the village of: Beverly Hills (i.e. that portion not included in S.O.C.S.D.D.), Bingham Farms, and Franklin.

22. The Clinton-Oakland Disposal District consists of the following municipalities: Novi, Orchard Lake Village, Rochester Hills, Independence Township, Oakland Township, Orion Township, Oxford Township, Auburn Hills (i.e. that portion not included in Evergreen-Farmington), Waterford Township, West Bloomfield Township (i.e. that portion not included in Evergreen-Farmington), and the villages of: Clarkston, Lake Orion, and Oxford.

23. Based on my familiarity with the thirty-five municipalities listed above:

a. Each municipality owns and maintains (or contracts for maintenance by the County) a sewer system which connects to the County's system.

b. Each municipality uses the rate charged by Oakland as a base for the rate charged by the municipality to the user, to which is added an additional charge to cover local municipal cost of operation and maintenance as well as a provision for contribution to a reserve fund.

c. Each municipality pays sewage disposal charges from a segregated account supported exclusively by money collected from sewer system users. The payments, when made, are deposited with the County Treasurer.

24. In summary, the County Treasurer obtains the necessary funds to pay Detroit from bills sent by the Districts to the municipalities, and the municipalities in turn obtain their funds by bills sent to the end users. The users pay the municipalities, which maintain segregated sewer accounts, and from those accounts the municipalities pay the County Treasurer, who maintains segregated Funds for each of the Districts. As such, the municipalities "pass through" sewage treatment costs directly to the users.

IT IS MORE DIFFICULT FOR THE MUNICIPALITIES TO DETERMINE THEIR DAMAGES THAN FOR THE COUNTY

25. The municipalities receive bills from Oakland County based on different methods of calculating charges. The different methods depend on the District(s) in which the municipalities are located, whether they have combined sewer/storm drains, and whether they "overlap" Districts.

26. The municipalities have no contractual relationship with Detroit; further, they have fewer resources and less expertise to combat overcharges and have relied on Oakland County in the past to challenge excessive rates charged by Detroit.

27. The City of Detroit has contracted with Oakland and, as a practical matter, looks to Oakland for administration and payment without regard to how the individual constituent municipalities are billed.

/s/ ROBERT H. FREDERICKS II
Robert H. Fredericks II

Subscribed and sworn to before me
November 11, 1985

/s/ KIMBERLY ANN YOUNG
Notary Public
County of Wayne, Michigan
My Commission Expires: August 26, 1986

No. 89-101

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT,
Petitioner,

v.

COUNTIES OF OAKLAND and MACOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONER COLEMAN A. YOUNG

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August 25, 1989

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONER COLEMAN A. YOUNG

INTRODUCTION

In their briefs opposing the Petitions for certiorari, Respondents concede that the Court of Appeals "assume[d] . . . that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. They recognize that under the Michigan statutory scheme, the Counties collect and retain in segregated funds the monies paid by the municipalities for sewerage services, make all payments to Detroit from these funds, are prohibited from using their general funds for this purpose, and may not make a profit or incur a loss on the sewerage funds. These uncontroverted facts mean that the Counties lack a sufficient interest in the outcome of this suit to be proper antitrust plaintiffs. While the Counties make several new arguments in their briefs in

opposition to the Petition, none of these arguments detracts from the merits of the Petition.

I.
BECAUSE STATE STATUTE REQUIRES THE COUNTIES TO PASS ON ALL DAMAGES AND ANY RECOVERY, THEY LACK A SUFFICIENT INTEREST IN THE OUTCOME OF THE SUIT TO BE PROPER ANTITRUST PLAINTIFFS.

Macomb County, rather surprisingly, relies on the Michigan statutory scheme as the centerpiece of its opposition to the Petition. Macomb starts with the premise that the antitrust laws should be construed to further the policies of deterrence and compensation by encouraging injured parties to file private suits. Macomb County Brief at 9. Macomb agrees with Petitioner that under this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), a defense may be available where the direct purchaser has passed on all of the alleged overcharges pursuant to a cost-plus contract or its equivalent. Macomb then concludes that this case falls within an *exception* to such a pass-on defense, because the Counties will also be required to pass on any *recovery* to the municipalities.

This remarkable conclusion stands Macomb's premise on its head. Under the reasoning of *Illinois Brick*, if the direct purchaser has standing to sue, the indirect purchasers *lack* standing. But a direct purchaser which has passed on all damages *and* will pass on any recovery pursuant to cost-plus contracts or state regulation would rarely have an incentive to sue.[1] A holding that a party in the Counties' circumstance has standing thus would *discourage* rather than encourage the filing of private antitrust suits. This would ill serve the goal of encouraging private antitrust enforcement.

---

[1] Apart from the salutary effect success in this case may have on the political fortunes of a few suburban politicians, it is difficult to hypothesize any reason for the Counties to pursue the present litigation.

The declared intent of both Oakland and Macomb Counties to pass on any recovery in its entirety also refutes the Counties' contention that horizontal allocation of damages among the municipalities or end users would involve insurmountable factual issues. The Counties have thus conceded that they intend to do what they contend the courts would find impossible to do.

Because the Counties have passed on 100 percent of any overcharges pursuant to state statute, they lack standing to sue under the reasoning of *Illinois Brick*, *Hanover Shoe* and *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipeline Co.*, 852 F.2d 891 (7th Cir.), *cert. denied*, ______ U.S. ______, 109 S. Ct. 543 (1988). That the Counties must also pass on any damage recovery makes this conclusion inescapable. This Court should grant certiorari to make it clear that the antitrust laws grant standing only to private plaintiffs with the requisite interest in the outcome of the suit.

II.
THE POTENTIAL AND INDIRECT INJURIES POSTULATED BY OAKLAND COUNTY DO NOT VEST THE COUNTIES WITH ANTITRUST STANDING.

While Oakland County also recognizes that it has passed on all alleged overcharges to the municipalities, Oakland seeks to base antitrust standing on two types of potential injury: (1) the possibility that in the future, the municipalities may not pay for sewerage services in full or on time; and (2) the possibility that in the future, higher sewerage service rates may make it more difficult for Oakland to attract or retain population and economic development, ultimately impacting its tax revenues. Oakland County Brief at 21.[2]

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[2]Oakland also devotes considerable verbiage to a refutation of Petitioner's "fundamental" contention that the Counties are not "'direct purchaser[s]' of sewage services . . . ." Brief at 17. Oakland ignores Petitioner's express assumption, for the purpose of the Petition, that the Counties were direct purchasers of a relevant service. Petition at 7 n. 9.

Neither of these purported types of injury is pleaded in the complaints or supported by Oakland's affidavit.[3] Oakland's complaint refers only to damages in the form of overcharges:

> Plaintiff [Oakland County] has been injured in its property and business, in that the charges collected by Detroit for the treatment and disposal of Oakland County's sewage have been unconscionably and unlawfully inflated.

Complaint ¶ 48. It is these overcharges which the Counties have passed on as required by statute. Oakland repeatedly refers to the assertion in its affidavit that under the contracts Oakland must pay Detroit for sewerage services "whether the municipalities pay the county on time or in full." Oakland County Brief at 6 & 18 n.13. Neither the complaint nor the affidavit, however, asserts that the municipalities have ever failed to pay in full or on time. In any event, the Counties are prohibited by statute from incurring a loss on the Sewerage Funds. Mich. Comp. Laws § 123.745.

Even more significantly, under this Court's holding in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), only a party which has suffered "antitrust injury" may bring a private antitrust suit. Antitrust injury consists only of damage which "flows from that which makes defendant's acts unlawful." 429 U.S. at 489. Injury to a County if a municipality fails to pay does not "flow[] from" the defendants' actions, but from the actions of the municipality. Under *Brunswick*, therefore, nonpayment by the municipalities would not result in antitrust injury to the Counties. As the district court noted, "[p]erhaps a more proper cause of action, if the goal is to replete the Funds, would be a contractual one against the municipalities." A-41, 628 F. Supp. at 612. In accord is *State of South Dakota* v. *Kansas City Southern Industries, Inc.*, ______ F.2d ______, 1989-1 Trade Cas. (CCH) ¶ 68, 635 (8th Cir. 1989).

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[3]Affidavit of Robert H. Fredricks II in Support of the Motion to Alter Judgment, reprinted in Appendix B to Oakland County's Brief.

Oakland's attempt to base antitrust standing on the possibility that higher sewerage rates may induce businesses and residents to locate elsewhere (besides appearing nowhere in the complaint or affidavit) has an equally fatal defect. Oakland is improperly attempting to sue as *parens patriae* for injury done to its residents.

While the Sixth Circuit hypothesized that the alleged overcharges might harm economic growth or development in the Counties, it did so only in the portion of its opinion dealing with constitutional standing. A-14, 866 F.2d at 847. The Sixth Circuit did not seek to premise antitrust standing on such injury, and with good reason.

In *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), the State of Hawaii filed suit as *parens patriae* against an oil company, seeking to recover for various types of injury resulting from overcharges imposed in violation of the antitrust laws. Among the categories of injury alleged was the adverse effect the overcharges had on "the economy and prosperity of the State of Hawaii." 405 U.S. at 255. The Court reasoned:

> A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4.

405 U.S. at 264. The Court concluded that injury to the "general economy" did not constitute injury to the "business or property" of the State, and therefore failed to vest the State with standing to sue as a private plaintiff under Section 4 of the Clayton Act, 15 U.S.C. § 15.

In reaction to *Hawaii v. Standard Oil*, Congress in 1976 adopted Section 4c of the Clayton Act, 15 U.S.C. § 15c (Supp. 1989), which grants the States power to sue as *parens patriae* for injury to the "property" of "natural persons residing in such State." Section 4c, however, grants such standing only to the States, not to counties or other political subdivisions. Nor does this section allow even the States to sue as *parens patriae* for injury to their corporate residents. By basing its claim to antitrust standing

on possible injury to its general economy, Oakland is unabashedly seeking to sue as *parens patriae* for injury done to its natural *and* corporate residents.

Countless other things, apart from rates for sewer services, undoubtedly — and more directly — affect the local economy. For example, rates and quality of gas, electric, telephone and other utility services; plant locations and closings; tax rates and land use regulation by competing municipalities; and even a decision to relocate a professional sports team or trade a star player may affect an area's ability to compete for population and industrial development. Oakland's reasoning would empower local governments to sue under the antitrust laws regarding any decision or practice, public or private, affecting any service or facility which by some stretch of the imagination might have a negative impact on an area's attractiveness. Oakland's sweeping approach to antitrust standing runs headlong into *Hawaii* v. *Standard Oil*.

On this point, Oakland mistakenly relies on *Carter* v. *Berger*, 777 F.2d 1173 (7th Cir. 1985). The defendant in that case allegedly defrauded Cook County on property taxes. The Seventh Circuit held that the County had standing to sue the defendant under RICO, and that other taxpayers lacked standing. It rested its holding in part on the assumption that

> [g]overnmental units of Cook County do not necessarily raise innocent people's taxes by $1 to offset every loss of $1 to fraud. The government is concerned about the overall rate of tax; higher taxes may induce people and businesses to move away and may depress economic activity.

777 F.2d at 1177. The Court of Appeals thus speculated that vertical damage apportionment problems may result from the county's desire to hold taxes down in order to spur economic development. The Sixth Circuit applied no such reasoning in its ruling on antitrust standing. To the contrary, it expressly assumed "that any and all overcharges were passed on to the counties' own customers, the municipalities." A-10, 866 F.2d at 845. Because this case involves no issue of vertical damage apportionment — the Counties have absorbed no part of any overcharge — *Carter* is inapposite.

Oakland attempts feebly to distinguish *Panhandle Eastern* on the ground that the direct purchaser in that case was a public utility, while the direct purchasers in the present case are governmental units concerned about the general economy. The Counties in the present case, however, are in exactly the same position as the utility which was the direct purchaser in *Panhandle Eastern*. Both cases involve a utility service as to which users have no reasonable alternative. The direct purchaser in both cases passed all overcharges on to others farther down the distribution chain pursuant to state regulation. Under *Hawaii* v. *Standard Oil*, mere concern about the general economy does not vest the Counties with standing. The conflict between the Sixth and the Seventh Circuits is clear and complete.

Finally, in what may be its most incomprehensible argument of all,[4] Oakland declares that Petitioner has asked this Court "to reverse or limit the Court's holdings in *Hanover Shoe* and *Illinois Brick* . . . ." Oakland County Brief at 29. One can search in vain for any request by Petitioner that this Court do anything of the sort. Petitioner has requested the Court to answer questions left unresolved in those cases, and to do so in a way which is consistent with their reasoning and that of the Seventh Circuit in *Panhandle Eastern*.

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[4]Oakland also incorrectly states that the Counties' allegations regarding the Mayor's fiduciary duty are not at issue in the three pending Petitions. Oakland County Brief at 9 n. 10. As Petitioner noted, the constitutional standing arguments raised by the City of Detroit and Nancy Allevato, *et al.*, in which Petitioner joins, would be dispositive of the Counties' fiduciary duty claims. Petition at 6 n. 8.

CONCLUSION

This Court should grant certiorari to resolve the conflict among the Circuits, to provide uniformity in administration of the antitrust laws, and to provide guidance to the lower courts and the public.

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August 25, 1989

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Nos. 89-56, 89-79, and 89-101

In the Supreme Court of the United States

OCTOBER TERM, 1989

NANCY ALLEVATO, ET AL., PETITIONERS

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

COLEMAN A. YOUNG, MAYOR OF THE CITY OF DETROIT, PETITIONER

v.

COUNTIES OF OAKLAND AND OF MACOMB, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the rule of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), precludes proof that a direct purchaser has passed on the full amount of an overcharge caused by a third party's antitrust violation to its customers.

2. Whether the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c), confers standing on a direct purchaser who has passed on the full amount of any unlawful overcharge to its customers.

3. Whether a direct purchaser who has passed on the full amount of an overcharge to its customers has standing under Article III.

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No. 89-56

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Oakland County and Macomb County brought this action seeking damages for alleged over-

charges by petitioner City of Detroit arising out of alleged violations of the antitrust laws and of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq*. (RICO). In the Detroit, Michigan area, municipal sewer systems connect to interceptor sewers built and operated by counties. The counties' lines in turn connect to the Detroit system. Detroit treats the sewage at its wastewater treatment plant and disposes of the resulting sludge.

Relationships among the municipalities, the counties, and the City of Detroit are governed by contracts entered into pursuant to state law. Under those contracts, Detroit bills the counties for services provided.[1] The counties are responsible for paying these bills, but they in turn bill the municipalities for services based on their own costs, which include Detroit's charges, costs incurred in building, operating, and maintaining the county system, and an allowance for reserves. Costs are allocated to the municipalities under a number of formulas, some involving estimates of usage. The municipalities in turn bill their residential and commercial customers in a variety of ways, allocating the county's charges and adding enough to cover their own local expenses. Municipal payments to the counties are segregated in county "enterprise funds," through which the county systems are operated. The counties draw their payments to Detroit from the enterprise funds. Pet. 3, 4.

At a time when petitioner Coleman A. Young, the Mayor of Detroit, was acting as administrator of the wastewater treatment plant under court order, Detroit entered into various sludge hauling and disposal contracts. These transactions eventually led to the convictions of various in-

[1] Like the court below, we describe facts largely in relation to respondent Oakland County because respondent Macomb County provided fewer facts. See 89-56 Pet. App. 5a-6a.

dividuals and entities in the sludge hauling business for RICO, Hobbs Act, and mail fraud violations. Following the criminal investigation, the respondent counties brought a civil action grounded on the same transactions. Respondents sought treble damages under the Clayton Act, 15 U.S.C. 15 and RICO, alleging that Detroit's bills to them included unlawfully inflated costs.

2. The district court, on a slender record,[2] dismissed for lack of standing. The defendants contended that the counties had not been injured because they had passed on the overcharge to the municipalities. Recognizing that *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had "severely restricted" the pass-on defense, the court nevertheless read a Sixth Circuit decision, *Obron* v. *Union Camp Corp.*, 477 F.2d 542 (1973) (adopting 355 F. Supp. 902 (E.D. Mich. 1972)), as establishing that the pass-on defense is valid where "circumstances are such that proof that any overcharged [direct purchasers] * * * have not been damaged is easy to prove." 89-56 Pet. App. 32a, 33a.

The court found those circumstances to exist in the structure of contractual relationships among Detroit, the counties, and the municipalities. In an earlier case where Oakland County had sued a municipality for sewer payments, the Sixth Circuit had found that "Oakland County served as an intermediary only, depending completely on payments from the municipalities to meet its obligations to Detroit," and that "[s]ince Oakland County is a mere conduit for sewer charges owed to the City of Detroit the failure of any of the municipalities * * * to pay the charges allocated to them would result in Detroit's receiving less money for sewage disposal than was assumed and planned for." *County of Oakland* v. *City of Berkley*, 742 F.2d 289, 292, 296 (6th Cir.1984). Relying on those statements in *Berkley*, the

[2] The record consists of the pleadings and one affidavit.

district court found that the counties sustained no injury because they were only intermediaries and, in effect, were not buyers but only collection agencies. 89-56 Pet. App. 34a.[3] Therefore, the court held, the counties had not alleged the injury in fact constitutionally required for standing.

The court also concluded that an exception to *Hanover Shoe* would be appropriate, because there was no problem of tracing the overcharges to the municipalities and the municipalities would have ample incentive to sue. 89-56 Pet. App. 34a-35a.[4] It further concluded that under *Associated General Contractors* v. *State Council of Carpenters*, 459 U.S. 519 (1983), the counties were not proper antitrust plaintiffs, primarily because they had suffered no injury. 89-56 Pet. App. 36a. In a subsequent order denying a motion to alter judgment, the court noted that the arrangements in this case are "[i]n essence" a pre-existing cost plus contract, 89-56 Pet. App. 43a, and therefore within the cost plus exception to the rule of *Hanover Shoe*.

Finally, the court held that the counties lacked standing under RICO, which provides remedies to anyone "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. 1964(c). The court reasoned that the counties were mere conduits and thus were not injured.

3. A unanimous panel of the Sixth Circuit reversed, holding that the counties had both constitutional and statutory standing. It first rejected the district court's suggestion that the counties were not really buyers, but only agents of the municipalities. The court of appeals noted that Detroit had entered into contracts with Oakland, not the

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[3] The counties are also end users, paying the municipalities for sewage disposal services, but the court found that the counties had not sued in that capacity. 89-56 Pet. App. 42a.

[4] The court treated the municipalities as consumers, although they in turn passed overcharges along to other consumers.

municipalities, and that there was no showing that Detroit was entitled to look to the municipalities for payment. 89-56 Pet. App. 9a.

The court of appeals assumed for purposes of its decision that "any and all overcharges were passed on to the counties' own customers, the municipalities." 89-56 Pet. App. 11a. The court nevertheless found constitutional standing because, under applicable precedent, "[a] buyer who is induced to pay an unlawfully inflated price for goods or services obviously suffers an actual injury," and standing is not lost merely because the overcharge is passed on. 89-56 Pet. App. 12a. Relying on *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the court found that the counties had alleged injury in fact, because the counties were liable for the overcharge, whether or not the municipalities paid. 89-56 Pet App. 13a-14a. Moreover, the higher cost of sewage services to the end user would hamper the counties in their competition with other counties for residents and businesses.[5] Thus, "[i]t would clearly be wrong for us to conclude at the outset of this litigation, based merely on the pleadings and [one] * * * affidavit, that the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

The court of appeals also found antitrust injury and standing. It read *Hanover Shoe* and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), not as establishing exceptions to the indirect purchaser rule, but only as suggesting that an exception might exist. 89-56 Pet. App. 20a.[6] It also held that a cost-plus exception would not preclude the counties from suing, because permitting the municipalities and/or

[5] The counties had not alleged this precise injury, but had generally alleged that they were injured in their business or property.

[6] The court of appeals said that *Illinois Brick* had "implicitly repudiated" its prior decision in *Obron*, on which the district court had relied. 89-56 Pet. App. 19a, 20a.

the end users to sue would introduce "precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid." 89-56 Pet. App. 21a.[7] The court found that its conclusion was "strongly confirmed" by the *Associated General* factors, all of which, it concluded, supported standing for the counties. 89-56 Pet. App. 22a-25a.[8]

Finally, the court, noting that the treble damage provision of RICO was "patterned directly on § 4 of the Clayton Act," 89-56 Pet. App. 25a, concluded that most of its antitrust standing analysis applied to RICO standing as well: "If the counties are the proper parties to sue for damages allegedly arising out of violations of the antitrust laws, it seems clear that the counties are also the proper parties to sue for damages allegedly arising out of RICO violations." 89-56 Pet. App. 25a.

On rehearing, the court noted that *Illinois* v. *Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S. Ct. 543 (1988), had recently recognized an exception to *Hanover Shoe* and *Illinois Brick* in the context of a pass-on required by state regulation, notwithstanding the absence of a fixed quantity guarantee. The court nevertheless declined to follow the Seventh Circuit's decision, reasoning that *Illinois Brick* had limited the possible cost plus exception to "contracts for a fixed quantity." 89-56 Pet. App. 27a-28a.

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[7] The court noted that there were multiple middlemen, that municipalities attempted to pass the overcharge on to end users, and that at best the pass on approach would lead to a massive class action in which ascertaining individuals' damages would be complex and difficult. 89-56 Pet. App. 21a-22a.

[8] The panel's rejection of the district court's conclusions on this point follow directly from its holding, contrary to that of the district court, that the counties properly alleged injury from an antitrust violation.

DISCUSSION

1. The central issue in this case, the proper scope of any cost-plus exception to the pass-on rule of *Hanover Shoe* and *Illinois Brick*, is an important question that has created considerable confusion in the lower courts. Petitioners contend that their use of a pass-on defense falls within the cost-plus exception to the rule of *Hanover Shoe* and *Illinois Brick*, even though there is in this case no preexisting cost-plus contract for a fixed quantity. *E.g.*, 89-56 Pet. 17. Assuming there is a cost-plus contract here,[9] this case presents the issue of the scope of the cost-plus exception.

Nevertheless, because of the unusual facts and the undeveloped state of the record, we believe that this case presents a less favorable context in which to resolve this issue than another case pending before this Court, *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.*, petition for cert. pending, No. 88-2109. First, the record here, consisting primarily of a single affidavit, provides minimal illumination of the factual context. Thus, the Court would be required to consider the question essentially in the abstract. It is unclear from the record, for example, whether either contract or statute requires the counties to pass on to the municipalities the full amount of any cost increases. It is also unclear how the counties' costs of administering the sewage system are passed on to the municipalities. Consequently, it cannot be determined whether an increase in Detroit's charges to the counties might lead the counties to absorb a higher proportion of those administrative costs. And it is unclear whether, in the event the counties do not

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[9] As we note, pp. 7-8 & note 10, *infra*, it is not clear that there is any legal requirement that the counties pass on cost increases to the municipalities.

pay Detroit's charges in full, Detroit is entitled to look to any county assets other than the enterprise funds.[10]

Second, under one plausible reading of the facts here, the issue presented may be narrower and of more limited applicability than the issue presented in *Kansas*. As we note in our brief in *Kansas*, much of the confusion in the lower courts concerns the significance of the "fixed quantity" requirement in this Court's formulation of the cost plus exception. In the absence of a fixed quantity provision, a direct purchaser may suffer lost profits because its customers purchase fewer of its products if it raises the price to reflect the overcharge. However, the record suggests that Michigan law and the terms of the contracts may insulate the counties from any such injury from lost profits as a result of reduced sales of sewage services. Viewing the record in this way, the Court might be able to decide the case on a ground of limited significance beyond the confines of this case. On the other hand, clarification of the cost plus exception in the context of the *Kansas* case is likely to resolve the issues in this case (to the extent they do not depend on facts not of record). Accordingly, we urge the Court to grant the petition in the *Kansas* case, and respectfully suggest that the Court defer acting on the petitions here pending disposition of that case.

2. In our view, neither the RICO issue nor the constitutional issue presented in the petitions warrants review. With respect to RICO, the court of appeals and the district court concluded that the proper analysis was essentially identical to that required under the Clayton Act. We know of no decision of any court reaching a contrary holding. Moreover,

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[10] We note that the court below pointed to the incomplete state of the record in refusing to hold that "the counties could not possibly have suffered any injury in fact as a result of having been overcharged by the City of Detroit." 89-56 Pet. App. 15a.

it seems plain that the court of appeals would have reached a different result had it concluded that respondents lacked standing under the Clayton Act. There is thus no reason for the Court to decide the RICO standing question now.

The question of constitutional standing also does not warrant review by this Court. If respondents have properly alleged injury to their business or property under the Clayton Act, RICO, or both, it seems plain that they have properly alleged injury for purposes of Article III. If they have not properly alleged injury under either the Clayton Act or RICO, it does not matter whether they have properly alleged injury for the purposes of Article III, since they claim no cause of action other than under the Clayton Act and RICO.

CONCLUSION

This Court should hold the petition for certiorari pending its disposition of *Kansas and Missouri, etc.* v. *Kansas Power & Light Company, et al.* No. 88-2109.

Respectfully submitted.

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